A

TREATISE

ON THE LAW OF

INSURANCE,

IN FOUR BOOKS;

I. OF MARINE INSURANCE,
II. OF BOTTOMRY AND RESPONDENTIA,
III. OF INSURANCE UPON LIVES,
IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

THE SECOND EDITION,
WITH CORRECTIONS AND ADDITIONS.

IN TWO VOLUMES.
VOL. II.

Laudo mercatorem, qui fidem, etiam contra leges datam, servat; sed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et rescindit pactiones quas lex rescindi jubet. Judicis est leges sequi; nec disputare an turpiter faciat assecurator, qui fidem datam violat.—Esto, turpiter faciat; sed, et turpiter facit qui contra leges paciscitur.

Bynk. Quæst. jur. priv. lib. 4. c. 5.

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NAMES OF THE CASES CITED.

Thofe in *Italics* are cited from Manufcript Notes.

Where a Cafe refers to feveral Pages, the firft is generally that in which it is cited moft at large.

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Bull,

A

TREATISE

ON THE

LAW OF INSURANCE.

BOOK THE FIRST.

CHAP. XII.

Of Loss.

Preliminary Obſervations.

A LOSS, in inſurance, is the injury or damage ſuſtained by the inſured, in conſequence of the happening of one or more of the accidents or misfortunes againſt which the inſurer, in conſideration of the premium, has undertaken to indemnify the inſured. Theſe accidents or misfortunes, or *perils*, as they are uſually denominated, are all diſtinctly enumerated in every policy. And no loſs, however great or unforeſeen, can be a loſs within the policy unleſs it be the direct and immediate conſequence of one or more of theſe perils (*a*). In our common policies they are ſet forth in the following words.

Perils uſually inſured againſt.

'Touching the adventures and perils which we the 'aſſurers are content to bear, and do take upon us in this 'voyage, they are of the ſeas, men of war, fire, enemies, 'pirates, rovers, thieves, jettiſons, letters of mart and coun-'ter-mart, ſurprizals, takings at ſea, arreſts, reſtraints, and 'detainments of all kings, princes, and people, of what 'nation, condition, or quality ſoever, barratry of the 'maſter and mariners, and of all other perils, loſſes, and 'misfortunes, that have or ſhall come to the hurt, detri-'ment or damage of the ſaid goods and merchandizes, 'and ſhip, &c. or any part thereof.'

(*a*) As to the riſks which are within the common policy, vid. ch. 7. § 2.

Total loſs.

Every loſs is either total or partial. The term *total loſs* is underſtood in two different ſenſes; natural and legal. In its natural ſenſe, it ſignifies the complete and abſolute deſtruction of the thing inſured. In its legal ſenſe it means, not merely the entire deſtruction or deprivation of the thing inſured, but alſo ſuch damage to it, though it ſpecifically remain, as renders it of little or no value to the owner. A loſs is alſo ſaid to be total, if, by the happening of any of the perils or misfortunes inſured againſt, the voyage be loſt, or be not worth purſuing, and the projected adventure fruſtrated; or if the value of what is ſaved be leſs than the freight.

Partial loſs.

To ſhip.

A partial loſs is any loſs or damage ſhort of, or not amounting to a total loſs; for if it be not the latter, it muſt be the former.—Thus, if a ſhip, inſured for a given voyage, arrive at her port of deſtination, and there remain 24 hours moored in ſafety; or, if ſhe be inſured for a *term*, and ſhe ſurvive the term; any injury which ſhe may have ſuſtained during the voyage, in the one caſe, or during the term, in the other, however great, can only amount to a partial loſs (*a*). So, in the caſe of an inſurance on goods; the inſurer contracts that they ſhall arrive ſafe at the port of delivery; or, if not, that he will indemnify the inſured. If they ſpecifically remain, and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loſs (*b*), unleſs they be rendered of no value, and altogether uſeleſs; for then the loſs is total (*c*).

To goods.

Average loſs.

Partial loſſes are ſometimes denominated *average* loſſes, becauſe they are often of the nature of thoſe loſſes which are the ſubject of average contributions; and they are diſtinguiſhed into general and particular averages (*d*).

Having premiſed thus much of the nature and different kinds of loſſes, which will be found more fully conſidered under the head of *Abandonment* (*e*), we now proceed to conſider this branch of our ſubject under the following heads:

(*a*) Vid. *Cazalet* v. *St. Barbe, Furneau* v. *Bradley, Fitzgerald* v. *Poole*, inf. c. 13. § 2.——(*b*) Vid. *Cocking* v. *Fraſer*, ſup. 227.—— (*c*) Vid. *Burnet* v. *Kenſington*, ſup. 234. and *Dyſon* v. *Rowcroft*, ſup. 238.———(*d*) Vid. inf. § 7.——— (*e*) Inf. ch. 13. § 1.

I. *Loſs by the perils of the ſea;*
II. ——— *colliſion;*
III. ——— *fire;*
IV. ——— *capture;*
V. ——— *arreſt and detention of princes;*
VI. ——— *barratry;*
VII. ——— *average contributions;*
VIII. ——— *ſalvage;*
IX. ——— *the death of ſlaves;*
X. ——— *the death of animals;*
XI. *Of fraudulent loſſes.*

Sect. I.

Of Loſs by the Perils of the Sea.

What is meant by perils of the ſea.

IN a large ſenſe, all the accidents or misfortunes to which thoſe engaged in maritime adventures are expoſed, may be ſaid to ariſe from the *perils of the ſea*; and, conformably to this idea, a loſs by capture was formerly holden, in our courts, to be a loſs by the perils of the ſea, as much as if it were occaſioned by ſhipwreck or tempeſt (*a*). But, in more modern times, it has been found convenient to diſtinguiſh the loſſes to which ſhips and goods at ſea are liable, by the more *immediate* cauſes to which they may be particularly aſcribed. In this view, loſſes *by the perils of the ſea* are now reſtricted to ſuch accidents or misfortunes only as proceed from mere *ſea-damage*, that is, ſuch as ariſe, *ex vi divina*, from ſtreſs of weather, winds and waves, from lightning and tempeſts, rocks and ſands, &c.

The ignorance or inattention of the maſter or mariners is not a peril of the ſea.

By the law of *France* the inſurer is not held liable for loſſes occaſioned by ignorance, or the want of care or attention, in the maſter or mariners, ſuch loſſes not being occaſioned by the perils of the ſea (*b*), or, indeed, by any other peril mentioned in the policy.—Mr. Juſtice *Lawrence*, in the caſe of *Tatham* v. *Hodgſon* (*c*), ſays,—"I do not know that it was ever decided that a loſs ariſing from

(*a*) Vid. 2 *Rol.* Ab. 248. pl. 10. *Comb.* 56. 1 *Show.* 322, 3. ——(*b*) *Pothier*, h, t. n. 64.——(*c*) 6 T. R. 656.

the miftake of the captain, was to be deemed a lofs by the perils of the fea."—In the cafe of *Gregfon* v. *Gilbert* (*a*), where the lofs was occafioned by the captain's miftaking *Jamaica* for *St. Domingo*, it was holden not to be a lofs by the perils of the fea.

Foundering.

A lofs by the perils of the fea may happen, *firft*, by the fhip's *foundering at fea*, and then it muft, in moft cafes, be total in the ftricteft fenfe of the word: *Secondly*, by *ftranding*, which is either *accidental*, as where the fhip is driven on fhore by the winds and waves; or *voluntary*, as where fhe is intentionally run on fhore, either to preferve her from a worfe fate, or for fome fraudulent purpofe. A ftranding may be followed by fhipwreck, in which cafe it becomes a total lofs; or the fhip may be got off in a condition to profecute her voyage, and then the damage fuftained, and the expences incurred, will be only a partial lofs of the nature of a general average: *Thirdly*, by the fhip's ftriking againft a funken rock, or any other thing under water, which may occafion the fpringing of a leak or abfolute fhipwreck.

Stranding.

Striking againft a funken rock, &c.

If the damage can be repaired, it is a partial lofs; if not, it is total.

If, upon a ftranding or other accident happening to the fhip, the damage can be repaired, and the fhip rendered capable of proceeding on her voyage; this, with reference to the fhip, is only a partial lofs. But if a repair cannot be had at the place where the fhip happens to be, either for want of materials or workmen, or where the mafter has no money or credit to procure any, *Valin* holds that this amounts to a total lofs, being of opinion that fuch obftacles to a repair ought to be confidered as a peril of the fea (*b*).

If a fhip be not heard of within a competent time, fhe fhall be prefumed to have foundered at fea.

It often happens that fhips founder at fea, and all on board perifh, and this out of the view of any perfon who could convey any information of the misfortune to the owners. In fuch cafe, therefore, there can be no pofitive proof of the caufe of the lofs. But where no intelligence has been received of a fhip within a competent time after fhe has failed, it may reafonably be prefumed that fhe foundered at fea; becaufe a lofs proceeding from any

(*a*) Inf. ch. 16. §. 2.——(*b*) Vid. *Pothier*, h. t. n. 120.

other caufe, would, probably, fooner or later, have been heard of.

As, where a fhip was infured in 1739, from *North* '*Carolina* to *London*, with a warranty againft captures 'and feizures.'—Four years after the fhip failed, an action was brought on the policy, and in the declaration the lofs was alledged to have happened "*by finking at fea*," and the evidence was, that fhe failed on her intended voyage, and had never afterwards been heard of.—It was infifted, for the defendant, that, as captures and feizures were excepted, it lay upon the plaintiff to prove that the lofs happened in the particular manner declared on.—But Lord C. J. *Lee* faid, that it would be unreafonable to expect certain evidence of fuch a lofs, where every perfon on board is prefumed to have perifhed: And all that can be required is, the beft proof the nature of the cafe admits of. He therefore left it to the jury, who found for the plaintiff. *Green* v. *Brown*, at N. P. 2 Su. 1199.

So, where a fhip was infured, 'Againft any lofs happening before the 30th of *November* 1762, free from 'average.'—The fhip failed from *Newcaftle* for *Copenhagen* (*a*), which is ufually about ten days voyage; but was taken by a *French* privateer, and ranfomed; and then proceeded on her voyage to *Copenhagen* in a bad condition. She never was heard of afterwards, though all due diligence was ufed to obtain intelligence of her, and feveral fhips that failed after fhe did, arrived fafe at *Copenhagen*.—Lord *Mansfield* told the jury, that this evidence was a fufficient ground to prefume that the fhip perifhed at fea, unlefs the contrary appeared. The jury accordingly found for the plaintiff. *Newby* v. *Reed*, at N P. Mich. Vac. 3 G. III. *Park* 63. S. P.

In *France* and *Spain* pofitive regulations have been made, to afcertain the time when the infured may call on the underwriters for the lofs, on the prefumption that a miffing fhip had perifhed at fea. In *Spain*, if a fhip be not heard of for a year and a half from her departure on a In fome countries there is a limitation of time for this prefumption.

(*a*) It is a fingular omiffion in the note of this cafe, that there is no mention of the time of the fhip's failing, nor how long after fhe failed the plaintiff brought his action.

voyage to or from the *Indies*, she is deemed lost. In *France*, after a year from a ship's sailing on *common voyages*, and two years on *distant voyages*, the insured may abandon and demand payment without other proof of loss (*a*).

In *England* there is no such limitation.

With us there is no time fixed by law when a missing ship shall be presumed to have foundered at sea. Every case must depend on its own circumstances; and it would be difficult to frame any certain uniform regulation for this purpose, that might not be productive of more inconvenience than advantage. Persons well acquainted with maritime affairs may form a pretty correct judgment when a ship, in any case, may be reasonably despaired of. When that time arrives, a liberal underwriter will pay his loss; and if any doubt remain, he may either demand security from the insured to refund the money, in case the ship should afterwards arrive safe, or he may trust to his remedy by action, to recover it back (*b*).

If a ship be driven on an enemy's coast, and there captured; this is a loss by capture, not by the perils of the sea.

Every loss must be imputed to its immediate, and not to any remote cause. Therefore, if a ship be driven by stress of weather on an enemy's coast, but not materially damaged, and she be there captured; this is not a loss by the perils of the sea, but by *capture*; and for this the insured may recover upon a policy against capture only (*c*.)

So, if part of a ship's crew be, by an irresistible force, and at a critical moment, taken away from their employment, and, in consequence, the ship drive on shore, the injury, thus occasioned, is a loss by the perils of the sea.

Hodgson v. *Malcolm*, 2 New Rep. 336.

Two of a ship's crew who were sent on shore to cast off a rope by which she was made fast, being impressed and carried away, without being allowed to cast off the rope, the ship went on shore:—This is a loss by the perils of the sea.

Thus:—The ship *Dolly*, was insured ' At and from ' *Plymouth* to *Sunderland*.' In an action on this policy, to recover for a loss by the *perils of the sea*, it appeared that the *ship*, having arrived at *Plymouth* with a cargo of coals, discharged a part at *Stonehouse*, and took a pilot on board to carry the vessel to *Sutton Pool*, to discharge the remainder of her cargo, and warped her down to *Stonehouse Gut*, in her way thither; that the pilot then sent two of the

(*a*) Vid. 2 *Mag*. 33. 177. Ord. of *Louis* XIV. h. t. art. 58. ——(*b*) Vid. *Tomkins* v. *Bernet*, 1 *Salk*. 22.——(*c*) Per Lord *Kenyon*, at N. P. *Green* v. *Elmslie*, *Peake* 212. inf. ch. 16. § 5.

crew on ſhore, in the ſhip's boat, to make faſt another line to the ſhore, and to caſt off their former; that theſe men were immediately impreſſed by ſome officers, upon which the maſter deſired they would ſuffer the men to caſt off the rope, and to ſend off the boat to the ſhip, being the only one belonging to her, but they would not do either, and carried away and kept the men for three quarters of an hour, and then ſent them back to the ſhip; that in conſequence of the rope not being caſt off, the bows of the ſhip were checked, and ſhe went aſhore nearly at high water, where ſhe grounded; that a part of her cargo being taken out into lighters, ſhe was got off, but, in conſequence of her being aſhore, ſhe was much ſtrained and made a great deal of water.—Upon this caſe it was objected on the part of the defendant, that this was not a loſs by the perils of the ſea, but by the miſconduct of the officers on ſhore in not permitting the rope to be caſt off, and the underwriters were not anſwerable for the miſconduct of the officers, againſt whom the plaintiff might bring an action.—But the court (*a*) held that, as the waves of the ſea were the immediate cauſe of the ſhip's being driven on ſhore, and as no blame was imputable to thoſe who had the management of the ſhip, it muſt be conſidered as a loſs by the perils of the ſea, and therefore that the plaintiff was entitled to recover.

If ſlaves be thrown overboard, on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe; this is not a loſs by the perils of the ſea.

But, if the maſter of a ſlave ſhip miſtake his courſe, whereby a ſcarcity of water enſues, and a number of ſlaves are thrown overboard to ſave the reſt; it will not be ſufficient for the inſured, in declaring for this loſs, to ſtate that, by contrary winds and currents, and *the perils of the ſea*, the ſhip was retarded, and the ſlaves periſhed for want of water (*b*).

So, if the ſlaves die for want of food, occaſioned by the extraordinary length of the voyage.

So, where a number of ſlaves periſhed for want of ſufficient and proper food, and this failure was occaſioned by extraordinary delay in the voyage, ariſing from bad and ſtormy weather; this was holden to be a loſs by natural death, and not by the perils of the ſea (*c*).

(*a*) Mr. Juſtice *Heath*, Mr. Juſtice *Rooke*, and Mr. Juſtice *Chambre*, againſt the opinion of Sir *James Mansfield* Chief Juſtice. ——(*b*) R. *Gregſon* v. *Gilbert*, inf. ch. 16. § 2.——(*c*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656.

So,

Rich v. Parr, 1 Esp. Rep. 444. Ant. ch. 14. § 1.

If a ship be destroyed by worms, this is not a loss by the perils of the sea.

So, where a ship was insured from *St. Bartholomew* to the coast of *Africa*, and during her stay and trade there, and back to *St. Bartholomew*.—In an action upon this policy, for a total loss by the *perils of the sea*, the evidence was that she had been destroyed by the worms, which are well known to infest the rivers in hot climates.—But a merchant swore, that he had known many instances of loss by this species of injury, but that the underwriters had uniformly refused to pay.—Lord *Kenyon* who tried the cause, decided, upon this evidence, that this was not a loss by the perils of the sea; and the jury unanimously concurred with his lordship, and found a verdict for the defendant.

The insurer is not answerable for any damage to the ship, occasioned by the ordinary services she is engaged in.

It is singular, that among the great variety of questions which have been agitated in our courts upon almost every subject of the law of insurance, not one has yet, I believe, occurred in which the line between the damage to the rigging and furniture of the ship for which the *owner*, and that for which the *insurer* is liable, has been distinctly drawn. It is clear that the insurer is not answerable for any deterioration of the ship, her rigging or furniture, occasioned by the ordinary sevice in which she is engaged. As to the accidents which occasionally happen to the rigging and furniture, foreign writers have attempted to lay down the rule. They say that if a cable break by the friction of the rocks, and an anchor be lost, the insurers are not answerable. But if by some extraordinary accident, as the violence of the winds or waves, it become necessary to slip a cable, or a cable be broke, and an anchor lost, or a sail or yard be carried away, this is a loss by the perils of the sea within the policy (*a*).

This, however, is not quite satisfactory. The best guide, perhaps, upon this subject, is the rule which governs average contributions. According to that rule, no injury, however great, occasioned by mere sea-damage in the ordinary employment of the ship, can be the subject of a general average.—For this reason, no such injury

(*b*) *Valin*, art 29, p. 76, *Pothier*, h. t. n. 66. *Emerig* tom. 1. p. 393.

ought

ought, I conceive, to be deemed a loss by the perils of the sea, within the meaning of the policy (*a*).

Sect. II.

Of Loss by Collision.

A SPECIES of damage to which ships at sea are often exposed, is that occasioned by *collision*, which is the case of one ship driving against, or running foul of, another. This may be the effect of mere accident, without blame being imputable to the master of either ship; or it may be occasioned by the negligence, unskilfulness, or misconduct of one or both of them. In general, by the marine law, an injury done by collision to a ship or her cargo, where no blame is imputable to the master of either, the loss is to be be equally borne by the owners of both (*b*). But this rule is not adopted by the law of *England*. For with us, when damage of this sort has been occasioned by mere misfortune, and without fault in any one, the owners of the ship or cargo damaged must bear their own loss; this being considered as a peril of the sea (*c*); and in this, our law agrees with the civil law (*d*). The injury, thus occasioned, being a peril of the sea, is holden to be a loss within the policy (*e*), unless it be imputable to the misconduct of the master or mariners of the ship insured; in which case the insurer is not liable, according to the opinion of *Emerigon* (*f*). But in such case, the wilful misconduct of the master or mariners would, I conceive, amount to barratry. An action, however, would lie against the master of either ship, to whom negligence or misconduct, is imputable for the injury done to the other (*g*).

(*a*) Vid. inf. § 7. in which the subject of general average is fully considered.——(*b*) Laws of *Oleron*, art. 14, of *Wisbuy*, art. 26, 50, 67, 70, Ord. of *Louis* XIV. tit. *Avaries*, art. 11, *Valin* thereon, *Bynk*. Quest. *Jur. Priv.* lib. 4, c. 18, 19, 20, 21.——(*c*) Per Lord *Kenyon*, in *Buller* v. *Fisher*, at G. H. after *Mich.* 1800.——(*d*) ff. 9, 2, 29.——(*e*) Vid. Ord. de *Louis* XIV., tit. *Avaries*, art. 11. and tit. *Assurance*, art. 26. ——(*f*) Vid. *Emerig.* tom. 1. p. 413. Vid. *Pothier*, h. t. n. 50, 65.——(*g*) Vid 5 *Rob.* Adm. Rep. 345.

Sect.

Sect. III.

Of Loss by Fire.

Whether a loss by fire, imputable to the fault of the master or mariners, be a loss within the policy.

There can be no doubt but that a loss occasioned by fire which is merely accidental, and not imputable to any fault of the master or mariners, is a loss within the policy; and in many places the insurer is held to be liable, even where the fire happens by the fault of the master or mariners (*a*). But in *France* the insurer is not held answerable in such case, unless, by the policy, he be liable for barratry (*b*).

If a ship be burnt by order of the state where she happens to be, to prevent infection; this is a loss within the policy.

Emerigon mentions two cases on this subject—In the one, a *Dutch* vessel was refused admittance into the port of *Majorca*, and was burnt by the *Spaniards*, from an apprehension that she had the plague on board: There the insurer was holden to be liable, no blame being imputable to the master or mariners.—In the other, a ship, with the plague on board, of which several persons had died, was carried into the port of *Marseilles*, the master pretending that the deaths were occasioned by *unwholesome food*. The infection was communicated to the town and neighbouring country. The ship was burnt.—Here it was determined that the insurer was not liable, upon the ground that the loss was occasioned by the misconduct of the master (*c*). In this case barratry could not have been one of the perils inserted in the policy.

If a ship be attacked by an enemy, and the master find it impossible to defend her, *Valin* and *Pothier* hold, that he may leave her and set her on fire, to prevent her falling into the enemy's hands, provided he can preserve the lives of the crew. In such case, the insurer is liable for the loss; for the master was justified in burning the ship under such circumstances (*d*).

(*a*) *Straccha*, gl. 18. *Targa*, ch. 65. *Emerig.* tom. 1, p. 434. ——(*b*) *Pothier*, h. t. n. 53. *Emerig.* ut sup.——(*c*) *Emerig.* ut sup.——(*d*) *Pothier*, h. t. n. 53, 65. *Valin*, art. 26. h. t.

Sect. IV.

Of Loss by Capture.

CAPTURE is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.—Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board. The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it..—Capture is deemed *lawful*, when made by a declared enemy, lawfully commissioned, and according to the laws of war; and *unlawful*, when it is against the rules established by the law of nations. What shall be deemed a capture.

But for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable (*a*), the words of the policy being sufficiently comprehensive to include every species of capture to which ships at sea can ever be exposed. Every capturue, whether lawful or unlawful, is a loss within the policy.

And in every case of capture the insurer is answerable, to the extent of the sum insured, for the loss actually sustained. This may be either *total*, as where the ship or goods insured are not recovered again; or *partial*, as where the ship is recaptured or restored before abandonment; in which case the insurer is bound to pay the salvage, and any other necessary expence which the insured may have been put to for the recovery of his property (*b*). And the insurers are answerable, to the extent of the sum insured, for the loss actually sustained.

And the insurer is liable for a loss by capture, whether the property in the thing insured be changed by the capture or not. For a ship is lost by capture, though she be never condemned, or even carried into any port or And they are liable whether the property be changed or not by the capture.

(*a*) *Le Guidon*, ch. 7. n. 1. *Casaregis*, disc. 1. n. 118. *Roccus*, n. 41. 54. 55, 64, 66. *Valin*, art. 26, h. t. *Pothier*, h. t. n. 54.——(*b*) As to salvage, vid. inf. § 8.

fleet

fleet of the enemy. It can never, therefore, be a question between the insurer and the insured, whether the capture be lawful or not, or whether the property be changed by condemnation or by being carried into an enemy's port. A capture by a pirate, or under a commission, when there is no war, does not change the property; and yet, as between the insurer and the insured, the effect is the same, as in the case of a capture by an enemy in open and declared hostilities: For whatever rule ought to be observed in questions of this sort, as between the owner and the *recaptor*, or his *vendee*, it can in no way affect the case, as between the *insured* and the *insurer*.

Therefore the effect of capture and recapture, in divesting or revesting the property, can make no question, except in insurances without interest.

Therefore, as to the length of possession by an enemy, which is deemed sufficient to divest the property out of the original owner, or the effect of a re-capture in revesting it,—these are now matters which can never come directly in question between the insured and the insurer. They never could have come in question, in any case of insurance upon *real interest*; because, according to the above principles, they never could have varied the case. They could only have had their origin in gaming insurances, in which there could be no average or benefit of salvage, and in which, therefore, it was always necessary to set up a total loss, for the purpose of the wager. In gaming insurances, when there was a re-capture, the claim, as for a total loss, seems formerly to have involved the question, whether the property in the thing insured had, by the capture, or any proceeding founded on it, been divested out of the original owner, or not, before the re-capture.

And yet, where a ship is insured '*interest or no interest*,' a capture, however illegal, and though the ship be retaken, is a total loss.

And yet the following cases will shew that, upon insurances, '*interest or no interest*,' it has been repeatedly determined that if the ship be taken, it is a total loss, however illegal the capture may be, and though the ship be retaken and restored to the owner.

It is observable, however, that the policies in the first, second, and fourth of these cases, though they contained the words '*interest or no interest*,' were evidently insurances upon real interest.—Lord *Mansfield*, indeed, in his

observations

observations on the first of them (*a*), says, 'that it was the case of a *wager policy*; and the ship having been once in fact taken, the event had happened against which the insurance was made, though she was afterwards recovered.'—But his lordship must have been misled by the words, '*interest or no interest*,' to suppose this to have been a wager policy; for it is plain, from the judgment, that the court considered the plaintiff as interested in the ship.

De Paiba v. Ludlow, 1 *Com.* 361.

The capture of a ship insured, '*interest or no interest*,' is a total loss, though it be illegal, and the ship recaptured.

In the first of these cases, a ship, insured '*interest or no interest*,' was taken by a *Swedish* pirate, and after continuing in his possession for nine days, was re-taken by an *English* man of war, and carried into *Harwich*, but not till after an action was brought on the policy:—The court held that though the ship was re-taken, yet the plaintiff received a damage, for his voyage was interrupted; that the question was, not whether the plaintiff should have his ship again, and should not lose his property, but what damage he had sustained.

Pond v. King, 1 *Wils.* 191.

A privateer insured for a three months cruise, '*interest or no interest*,' is taken, and after three days is retaken; yet it is a total loss.

The next was, where a privateer was insured 'for three 'months, *interest or no interest*, free from average, and without 'benefit of salvage.'—The ship was taken by a *French* ship of war, within the three months; her guns and 117 of her men taken out of her, and carried into *France*. But after she had remained in possession of the enemy for three whole days, and before she was carried into any port of the enemy, she was retaken by an *English* privateer, and carried into *Lisbon*, before the expiration of the three months; so that by the capture she was prevented from finishing her cruise. It appeared that the insured was interested to more than the amount of the sum insured; and that the master of the privateer had obtained a decree, in the court of admiralty of *Gibraltar*, that the ship should be restored to the owners, on payment of one third part for salvage.—The court determined that, though the ship was never carried *infra præsidia hostium*, this was not a

(*a*) Vid. Lord *Mansfield*'s observations on *De Paiba* v. *Ludlow*, 2 *Bur.* 695.

partial, but a total, loss to the insured.—Lord C. J. *Lee*, in delivering the opinion of the court, said;—"Although, by the civil law, it may not, perhaps, be adjudged a total loss, yet the rules of that law are not to govern us, but we must give our judgment according to the common law of *England*, upon this agreement between the parties, whose intention appears and must guide us. By the civil law, there must be a total loss, to entitle the insured to recover; but the policy, in this case, extends to captures and other accidents.—The meaning of the parties here is plain: The insured paid his premium in consideration of the insurer's undertaking that the ship should cruise safely for three months; the jury have found that she was disabled from prosecuting her cruise for three months. The insurance is to be understood for the cruise of three months, and in common sense it cannot be otherwise; so that, as soon as the voyage is broken or interrupted, the cruise is at an end. Safety during the three months is what is meant; but it appears that the ship was taken and detained within that time, and that the plaintiff was hindered in his cruise; and this, by our law, is a total loss to the plaintiff. I have avoided saying any thing on the question, whether this was a prize or not, as having never been carried *infra præsidia hostium*, because we are all of opinion that this is a total loss."

Dean v *Dicker*, at N. P. 2 Str. 1250.

Goods are insured '*interest* '*or no interest*.' The ship is taken and carried into the enemy's port; and after eight days cut out, and restored to the owner, on payment of salvage; yet the insured shall recover as for a total loss.

In the third of these cases, the insurance was, 'on *goods*, *interest or no interest*, at and from *Jamaica* to *Bristol*.'—The ship in her passage was taken by a *Spanish* privateer, and carried into a port in *Spain*, kept there eight days, and then cut out by an *English* ship.—The plaintiff insisted that this insurance, though on goods, was to be considered as a wager on the bottom of the ship, and therefore, he was entitled to recover as for a total loss.—The defendant contended that, by the stat. 13 G. II. c. 4. the ship and cargo were to be restored to the owners upon paying salvage (*a*); and that this was only an average loss, and the plaintiff

(*a*) Vid. inf. § 8. how salvage is at present regulated.

could only recover in the caſe of a total loſs.—Lord C. J. *Lee* held, that the plaintiff was entitled to recover: For this was a wager upon a total loſs, and here had happened one, by the ſhip's being carried into port, and there detained eight days; that where the policy is, '*intereſt* '*or no intereſt*,' the proviſions of the act, in caſes of valued policies, could not take place; that the act does not declare that the property is not gone by ſuch a capture, but only provides for reſtoring the ſhip to the *former owner*; but, that it might be otherwiſe, where the ſhip was re-captured before ſhe was carried *infra præſidia*; or in caſe of goods actually on board, and upon a valued policy.

The laſt of theſe caſes was where an inſurance was made on a ſhip '*intereſt or no intereſt*, *free of average*, &c. from *Jamaica* to *Hull*.'—In her voyage ſhe was taken by a *French* privateer and carried into *Hamburgh*; and after being twelve days in the hands of the enemy, was retaken by an *Engliſh* ſhip, and brought to *London*, where ſhe was adjudged to be reſtored to the owner, paying ſalvage.—The owner ſold the ſhip and paid the ſalvage.—In an action on the policy, this was holden to be a loſs of the voyage; and a verdict was given accordingly.

Whitehead v *Bance*, at N. P. B. R. Mich. 1749. *Park* 77.

A captured ſhip inſured '*intereſt* '*or no intereſt*,' is retaken after 12 days, and ſold by the owner to pay the ſalvage: —This is a total loſs.

But though no queſtion can now ariſe, between the inſured and the inſurer, as to the effect of a capture, or re-capture, in diveſting or reveſting the property; yet, as it may ſometimes be of importance, in matters of inſurance, to know how the law ſtands on this ſubject, it may not be improper, here, to enquire, ſhortly, when a capture ſhall be deemed to transfer the property to an enemy, and what ſhall be the effect of a re-capture in reveſting it in the original owner.

The effect of a capture and re-capture in diveſting or reveſting property.

Voet on the pandects, and ſeveral authors he refers to, maintain with great earneſtneſs, *per ſolam occupationem*, *dominium prædæ hoſtibus acquiri*. (*a*). But the general opinion ſeems to be, that by the law of nations, the pro-

Opinions of different authors on this ſubject.

(*a*) *Voet*, lib. 49, tit. 15, vol. 2, p. 1155.

perty

perty of things captured in war is changed when all reasonable hope of recovering them is gone; and, with respect to things moveable, all reasonable hope of recovering them is presumed to be gone when they are brought within the protection of the enemy's fortress (*a*).

But what custody of ships or effects taken at sea, shall be equivalent to a placing of things captured on land *infra præsidia*, is a subject of much doubt and dispute. *Grotius* says, that ships or goods taken at sea become the property of the captors, when they are brought into the enemy's harbours, or to the place where his whole fleet is stationed; for then all hopes of recovering them may be said to vanish. But, he adds, that by the law of nations, as introduced among *European* states in more modern times, things are considered as captured, when they have been 24 hours in the power of the enemy (*b*).

Bynkershoek, and several writers whom he follows, absolutely deny this pretended rule of the law of nations, and insist on the rule of the *Roman* law, that the prize must be carried *infra præsidia*, before it can become the property of the captor; and by *præsidia* he understands the *camps*, the *ports*, the *towns*, and the *fleets*, of the enemy (*c*).

Other writers have drawn other lines, by arbitrary distinctions, partly from policy, to prevent too easy a dis-

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(*a*) *Cæterum in hâc belli quæstione placuit gentibus, ut cepisse rem is intelligatur qui ita detinet ut recuperandi spem probabilem alter amiserit, aut ut res persecutionem effugerit. Hæc autem in rebus mobilibus ita procedit, ut capta dicantur ubi intra fines, id est præsidia hostium, perducta fuerint.* *Grot.* de jur. bel. ac pac. lib. 3. c. 6. § 3. Vid. *March* Rep. 110.——(*b*) *Cui consequens esse videtur, ut in mari navis et res aliæ captæ censeantur tum demum cum in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perductæ sunt.—Nam tunc desperari incipit recuperatio. Sed recentiori jure gentium inter* Europœos *populos introductum videmus, ut talia capta censeatur ubi per horas viginti quatuor in potestate hostium fuerint.* *Grot.* ubi sup.—Vid. *Consolato del Mare*, c. 283, 287. *Roccus*, not. 66.——(*c*) Vid. *Bynk.* jur. pub. lib. 1, c. 4.

position

position to neutrals, and partly from equity, to extend the *jus postliminii*, or the right of reclaiming what has been recovered from the enemy, in favour of the original owner. No wonder, therefore, that there is so much uncertainty, and such a variety of notions among them about fixing a positive boundary by the mere force of reason, where the subject matter is arbitrary, and not the subject of reason alone. (*a*).

How considered by the law of *England*.

In our courts of admiralty it has always been holden that, by the marine law of *England*, independently of the statute which commands restitution, and fixes the rate of salvage, the property is not changed in favour of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation: And in the reign of King *Charles* II. a solemn judgment was given upon this point; and restitution of a ship taken by a privateer was decreed, after she had been fourteen weeks in the enemy's possession, *because she had not been condemned* (*b*). The same doctrine has, in several instances prevailed in our courts of common law (*c*). In one case it was holden that nine days possession by the captor, and in another, that four years possession, and several voyages performed, will not change the property, without a sentence of condemnation (*d*).

The insurer is liable for all fair charges occasioned by the capture.

When there has been a capture, whether legal or not, and the ship has been recaptured or restored before abandonment, the insurer is bound to defray all necessary expences which the insured has been put to for the recovery of his property. He is therefore liable for a sum of money paid by the insured to the captors, as a *compromise* made *bonâ fide*, to prevent the ship from being condemned as prize.

(*a*) Vid. Lord *Mansfield*'s judgment in *Goss* v. *Withers*, 2 *Bur.* 695.——(*b*) Cited by Lord *Mansfield* as a case reported to him by Sir *Geo. Lee.* Vid. *Goss* v. *Withers*, 2 *Bur.* 695.——(*c*) *Assievedo* v. *Cambridge* 10 Mod. 79.——(*d*) —— v. *Sands*, 10 Mod. 79. See Lord *Mansfield*'s observations on these cases, 2 *Bur.* 695. The cases themselves are so defectively reported, that I have not thought them worthy of a more particular notice.

Berens v. *Rucker*, at N. P. 1 Bl. 313.

A ship, warranted neutral, is captured as an enemy's ship, and the owners, after an interlocutory decree against them, agree to a compromise:—This being done *bona fide*, the insurer is liable for the sum paid under such compromise.

Thus:—The *Dutch* ship *Tyd* and her cargo were insured 'At and from *St. Eustatia* to *Amsterdam*, warranted 'Dutch property, and not laden in any *French* port in the '*West Indies*.'—In *May* 1758 the ship took in a cargo of sugars, indigo, and other *French* commodities, partly out of barks, partly from the shore. On the 18th of *June* she sailed on her voyage, and on the 27th was taken by an *English* privateer, and carried into *Portsmouth*, proceedings in the court of admiralty were begun in *August*, and after many delays and citations from court to court, an interlocutory order was pronounced, in *February* 1759, for the contumacy of the claimants in not specifying what part of the cargo was taken from the shore, what from barks; and it was decreed that the goods should be presumed *French* property. There was an appeal to the lords commissioners of prizes, but as many causes stood before it, the market very high, and the cargo in part perishable, the agent of the owners agreed with the captors to give them 800 l. and costs, to obtain the reversal of the sentence. This was obtained by consent, and it was decreed that there was a sufficient cause of seizure, in order to give costs to the captors, and restitution was decreed to the owners. After the ship's arrival at *Amsterdam*, the chamber of insurances there settled the average of the loss and expences occasioned by the capture, detention, and litigation; and for this the action was brought.—Lord *Mansfield* said;—"The first question is, whether this was a just capture (*a*). Both sentences are out of the case, being done and undone by consent. The capture was unjust. The pretence was, that part of this cargo was put on board off *St. Eustatia*, out of barks supposed to come from the *French* islands, and not loaded immediately from the shore. It is now a settled point, that it is the same thing as if they had been landed on the *Dutch* shore, and put on board afterwards, in which case there is no colour for seizure. The rule

If the produce of an enemy's country be brought from thence in barks and put on board a neutral ship; this will be the same as if the goods had been shipped from the shore in a neutral port. But a neutral ship,

(*a*) This became a question, on account of the warranty that the ship and cargo were *Dutch* property; for if the capture had been just, it would have falsified the warranty.

rule is, that if a neutral ship trade to a *French* colony, with all the privileges of a *French* ship, and is thus adopted and naturalized, it must be looked upon as a *French* ship, and is liable to be taken. Not so, if she have only *French* produce on board, without taking it in at a *French* port; for it may be purchased of neutrals.—The second question is, whether the owners have acted *bonâ fide* and uprightly, as men acting *for themselves*, and upon a reasonable footing; so as to make the expences of this compromise a loss to be borne by the insurers. The judge of the admiralty's order to specify was illegal, contrary to the marine law, and to the act of parliament which is declaratory of the marine law: Because, if they had specified, it would be of no consequence, according to the rule before-mentioned. Yet the captors were in possession of a sentence, though an unjust one. And a court of appeal cannot, or seldom does, give costs or damages which have accrued subsequent to the original sentence; for those damages arise from the fault of the judge, not of the parties. Under all these circumstances, therefore, the owners did wisely to offer a compromise. The cargo was worth 12,000 l.; the appeal was hazardous; the delay certain. The *Dutch* deputy in *England* negociated the compromise. The chamber of commerce at *Amsterdam* ratified it, and thought it reasonable. Had the whole sentence been reversed, the costs must have fallen heavy on the owners. I therefore think the insurers liable to answer this average loss, which was submitted to, to avoid a total one." The jury found for the plaintiff.

trading to an enemy's colony, with all the advantages of an enemy's ship, is liable to capture.

Formerly it was a common practice to ransom *British* ships, when captured by an enemy, by delivering to the enemy what was called a ransom bill, which secured to the captor the price agreed upon, and operated as a bill of sale of the ship and cargo to the original owners, and as a protection to the ship against other cruisers of the enemy during the remainder of her voyage. A hostage was delivered to the captor to secure to him the punctual payment of the stipulated sum.

Of ransoming captured ships.

Actions at common law were formerly maintained on ransom bills.

This ransom bill, independently of the hostage, was considered as a contract of the law of nations, and obligatory upon the owners as well as upon the captain and hostage who signed it (*a*); and actions have been often brought upon them in our courts of common law. And where the ship or goods were insured, the amount of the ransom was usually taken to be the measure of the demand of the insured upon the underwriters in respect of the capture (*b*).

Anthon v. *Fisher*, *Doug.* 648, 9.

But now an alien enemy cannot sue for any right acquired by actual war.

But at length, in an action on a ransom bill, which came before the court of King's Bench in *Trinity* Term 1782, it was contended on the part of the defendant, that as questions on ransom bills arise out of *matter of prize*, and are to be decided therefore by the *jus belli*, such questions are not triable in any court of common law, but belong exclusively to the courts of prize.—The judges of that court differing in opinion upon this question, they gave judgment for the plaintiff *pro formâ*, and the cause being removed by writ of error to the *Exchequer Chamber*, it was there unanimously determined, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war, and the judgment of the Court of King's Bench was reversed.

And now, by stat. 22 G. III. c. 25, it is declared unlawful to ransom any *British* ship taken by the enemy.

But this practice of ransoming ships captured by the enemy being found to operate more to the disadvantage than for the benefit of this country, it was at length thought proper to prohibit it altogether. And therefore by stat. 22 G. III. c. 25. § 1. it is enacted, 'That it 'shall not be lawful for any of his Majesty's subjects 'to ransom, or to enter into any contract or agreement 'for ransoming, any ship or vessel belonging to any of 'his Majesty's subjects, or any merchandize or goods 'on board the same, which shall be captured by the sub-'jects of any state at war with his Majesty, or by any 'person committing hostilities against his Majesty's sub-'jects.' And by § 2. 'All contracts and agreements which

(*a*) *Si quid singuli hosti promiserint, est in eo fides servanda. Cic.* Vid. *Burlamaqui*, part. 4. ch. 4. *Vattel*, liv. 3, ch. 16, § 233. *Grot.* lib. 3, ch. 21, § 1.—(*b*) Vid. *Ricord* v. *Bettenham*, 3 *Bur.* 1734, 1 *Bl.* 563. *Cornu* v. *Blackburne*, *Doug.* 619.

'shall

'shall be entered into, and all bills, notes, and other se-
'curities, which shall be given by any person or persons
'for ransom of any such ship or vessel, or of any mer-
'chandize or goods on board the same, shall be absolutely
'void in law, and of no effect whatever.' And, by § 3, a penalty of 500 l. is given to the informer, for every offence against the act. This statute has put an end to all questions on the law of ransoms.—And yet it is singular that though this act has no clause of limitation, as to its duration, and is therefore perpetual, the same provisions are re-enacted in the same words, by each of the two last prize acts, 33 *G.* III. c. 66, § 37, 38, 39, and the 43 *G.* III. c. 160, § 34, 35, 36; and in this last act, § 34, the words, "Unless in the case of extreme necessity, to "be allowed by the court of admiralty," are added to the first clause; and yet both these acts are only to continue during the respective wars for which they were made.

If a ship be recaptured before she is carried into an enemy's port, she may, with the consent of the recaptors, prosecute her original voyage.

It often happens that a recaptured ship is in a state to prosecute her original voyage; and, in that case, it is the interest of the recaptors, as well as of the other parties concerned, that she should be permitted to do so. The last prize act (*a*) has therefore very properly provided, 'That if a ship be retaken before she has been carried 'into an enemy's port, it shall be lawful for her, if the 'recaptors consent thereto, to prosecute her voyage; and 'it shall not be necessary for the recaptors to proceed to 'adjudication till six months after the recapture, or till 'the return of the ship to the port from whence she 'sailed; and the master, owners, or agents, with the 'consent of the recaptors may dispose of their cargoes 'before adjudication: And in case the vessel shall not re-'turn to the port from whence she sailed, or the recaptors 'shall have had no opportunity of proceeding regularly to 'adjudication within the six months, on account of the 'absence of the said vessel, the court of admiralty shall, at 'the instance of the recaptors, decree restitution to the 'former owners, they paying salvage, upon such evi-'dence as to the court shall, under all the circumstances 'of the case, appear reasonable; the expence of such pro-'ceeding not to exceed *fourteen pounds*.'

And the recaptors shall not be obliged to proceed to adjudication, till after six months, or the return of the ship.

(*a*) Stat. 43 *G.* III. c. 160. § 41.

Sect. V.

Of Loss by Detention of Princes.

BY the terms of the policy the insurer is answerable for all loss occasioned by "*arrests or detainments of all* "*kings, princes, and people, of what nation, condition, or* "*quality soever.*" Under these words, which are nearly the same in the policies of all the other maritime countries of *Europe*, the insurers are liable for all losses occasioned by arrests or detention of the ship or goods insured, by the authority of any prince, or public body claiming to exercise sovereign power, under what pretence soever.

What shall be deemed an arrest and detention of princes.

As if the sovereign of the country to which a ship belongs, or any other sovereign, not at war with him, from motives of necessity, not of hostility, arrest the ship either singly, or together with others in the same port or harbour; this is a detention of princes (*a*).

Difference between capture and arrest of princes.

There is an obvious difference between capture and arrest of princes: The object of the one is prize; that of the other detention, with a design to restore the ship or goods detained, or to pay the value to the owner. And though neither of these should be done, still it must be considered as an arrest of princes, because the character of any action depends on the original design with which it was done.

If a ship be detained, upon a war breaking out; this is *capture*, not arrest.

When a ship is detained in a port after a declaration of war, or the issuing of letters of reprisal, against the country or state to which she belongs; this more resembles *a capture* than a detention, and gives the insured an immediate right to abandon, as for a loss by capture, even though no condemnation be pronounced, and though the ship be afterwards restored (*b*).

(*a*) Vid. *Le Guidon*, ch. 7, art. 6, and ch. 9, art 6, and 13; *Valin*, tom. 2, p. 416.——(*b*) Vid. *Pothier*, h. t. n. 56.

It may be at sea as well as in port.

An arrest of princes may be at sea as well as in a port or harbour, provided it be done from public necessity, not with a view to plunder. *Roccus* (*a*) mentions the case of a *Genoese* ship laden with corn, which was seized *at sea* by the *Venetian* gallies, and carried into *Corfu*, where there was a famine at the time, and there sold and paid for.—The insured instituted a suit in the *Rota* of *Genoa* against the insurers, and insisted that this was a *capture* for which they might abandon. The insurers answered that this was merely a *detention of princes*, the object of which was not to capture the ship, but to purchase the corn which the necessity of the public required. *Diversio facta fuit, non ad capiendam navim, sed ob publicam utilitatem grani consequendi causâ. Licuit frumenta accipere, soluto pretio.*—This was held to be a good defence.

Seizing a corn ship at sea, for the relief of a place suffering under a famine, is only an arrest of princes, not a capture.

And yet, if a neutral ship be arrested at sea, and carried into a port belonging to one of the belligerent powers, under pretence that she belongs to the enemy, or that she is laden with enemy's goods; this must be considered as a *capture*, because it is done *as an act of hostility*; and the ship's being afterwards restored, will not change that which was originally a capture into a detention of princes (*b*).—But in the case of *Saloucci* v. *Johnson*, already particularly mentioned (*c*), the court of King's Bench determined, that the refusal of a neutral to submit to a search by a *Spanish* ship of war, and resisting with force, was no forfeiture of the ship's neutrality; and that the ship being arrested and carried into *Spain* for this resistance, the insured was intitled to recover against the underwriters as for "*an improper detention.*" And though it has since been determined, both in the court of King's Bench and the court of admiralty, that resisting a search is a lawful cause of capture and confiscation (*d*), yet the above case of *Saloucci* v. *Johnson*, may nevertheless, I conceive, be considered as an authority to prove that if a neutral ship be *unlawfully* arrested and

But if a neutral be taken at sea, under pretence that she is an enemy, this is a capture.

So, if it be under pretence that she committed an offence against the law of nations.

(*a*) h. t. n. 60.——(*b*) *Emerig.* tom. 1. p. 537.——(*c*) Sup. 387.——(*d*) Sup. 389.

detained

detained by a belligerent cruiser for any pretended offence against the law of nations, this would be a detention of princes.

But if a ship be seized for navigating against the laws of a foreign state, this is not a detention of princes.

But if a ship misconduct herself; as by navigating against the laws of a foreign country, which she is bound to observe, or for not paying customs, &c. and thereby subject herself to seizure or confiscation; this shall not be deemed a loss by restraint or detention of princes (*a*); though, perhaps, it may amount to barratry of the master (*b*).

Embargo.

The most frequent cause of detention is an embargo, which is a proclamation or order of state, usually issued in time of war, or threatened hostilities, prohibiting the departure of ships or goods from some or all of the ports of such state until further order. An embargo laid on ships and merchandize in the ports of this kingdom by virtue of the king's proclamation, is strictly legal, when the proclamation does not contravene the ancient laws, or tend to establish new ones; but only to enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary (*c*).

This, whether legal or not, is a detention within the policy.

But it is needless, in this place, to enlarge upon the right of our own sovereign, or that of any other, to lay embargoes. For whether an embargo be legally or illegally laid, the injury to the owner, by the detention of his ship or goods, is the same; and the insurer is equally liable for the loss occasioned by it.

The word *people* in the policy means *a* people, or nation, not a mob.

By the word *people* in the policy is not to be understood any promiscuous or lawless rabble that may be guilty of attacking or detaining a ship: The following case will shew that it means *a* people; that is, a nation in its collective and political capacity.

Nesbitt v. *Lushington*, 4 T. R. 783.

A ship is forceably seized by a tumultuous rabble:—This is a loss by pirates, but not by detention of a people.

A cargo of corn and coals was insured from *Youghall* to *Sligo*, in *Ireland*.—The first count of the declaration, in describing the loss, stated that the ship, by stress of weather, was forced into *Elly Harbour*; where she was, with force

(*a*) Per Lord Commissioner *Hutchins*, 2 *Vern*. 176.—(*b*) Vid. *Salucci* v. *Johnson*, sup. 387. —(*c*) 3 Inst. 162. 4 Mod. 177. 179. 1 *Bl.* Com. 270.

and

and violence, attacked, boarded, arrested, and detained, *by people to the plaintiff unknown*; by reason whereof the corn was wholly lost. In the second count it was stated that the ship being in *Elly Harbour*, was with force and violence attacked and boarded, seized and taken, by certain *pirates*, to the plaintiff unknown, whereby the corn was wholly lost.—The policy was in the usual form.—It appeared that the ship was forced by stress of weather into *Elly Harbour*; and there happening to be a scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, and would not leave her till they had forced the captain to sell all the corn at a certain price, except 10 tons which was spoiled by the stranding and thrown overboard. The ship afterwards arrived at her destined port, with the coals. The court determined that this was a capture by pirates, and not a loss within the meaning of the words arrests, &c. of kings, princes, and *people*.—Lord *Kenyon* said the word *people* meant *the ruling power of the country*. Mr. Justice *Buller* said it meant the *supreme power of the country*, whatever that might be. This, he said, appeared by another part of the policy; for where the wrongful acts of *individuals* are mentioned, they are described by the names of *pirates*, rogues, thieves. Then, having specified all the *individuals* against whose acts the insurance is made, it specifies those occasioned by the acts of kings, princes, and *people* of what nation, condition, or quality soever; which must apply to "nations," in their collective capacity (*a*).

By the *French* law, where a ship has been arrested in time of peace, as there is reason to hope, in such case, An arrest by the authority of the *British* government is a loss within the policy.

(*a*) *Roccus*, (h. t. n. 54.), in the following passage, seems to interpret the usual words of the policy in a larger sense than that to which they are here restricted:—*Si merces captæ a potestate, seu judice justitiam administrante in illo loco, aut a populo* aut ab aliâ quacunque personâ, *per vim, absque pretii solutione, tenentur assecuratores solvere æstimationem dominis mercium, factâ prius per dominos mercium cessione ad beneficium assecuratorum, pro recuperandis illis mercibus, vel pretio ipsorum a capientibus.*

that

that she will soon be set at liberty again, such an arrest is not reputed the species of loss that will at once justify an immediate abandonment; but the owners must wait till the expiration of a certain time, regulated by the ordinance of the marine, which, for an arrest in *Europe*, is six months from the time notice of such arrest is given to the underwriters (*a*). —This regulation is founded on a sacrifice of the interests of commerce to the pleasure of the government. In *England* the rule is more just; for there, from the moment of a capture or arrest, the owners are considered as having lost their power over the ship and cargo, and are deprived of the free disposal of them; because, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, is equivalent to a total deprivation: It is therefore unreasonable to oblige the insured to wait the event of a capture, detention, or embargo (*b*).

A suspension of the power of disposal is a total loss.

Therefore, if a *British* ship be arrested or seized by the authority of the *British* government, from state necessity; this shall be a detention within the meaning of the policy, for which the insurer is liable (*c*).

Green v. *Young*, at N. P. 2 Lord *Ray*. 640. *Salk*. 444.

A *British* ship is seized at *Jamaica*, and converted into a fire-ship by the government there: It seems the insurer is liable.

As, where a ship was insured, 'from her arrival at —— 'in *Jamaica*, and during her voyage to *London*:'—An embargo was laid on the ship by the government, who afterwards seized her, and converted her into a fire ship, and offered to pay the owners.—The question was whether this would excuse the insurers? Lord C. J. *Holt* seemed to be of opinion that it would not; and that this was within the words *detention of princes*, &c.: But he gave no absolute opinion, because the cause was referred.

If a ship, insured *at and from* a port be arrested *in* that port, this is an arrest within the policy.

So, if a ship be insured "*at and from*" a given port, a detention by public authority, in that port, is a detention within the words of the policy. For the words of the policy being large enough to cover this risk, nothing

(*a*) *Pothier*, h. t. n. 56.——(*b*) Vid. Lord *Mansfield*'s judgment in *Goss* v. *Withers*, 2 *Bur*. 683. inf. ch. 13. § 1.——(*c*) Vid. *Emerig*. tom. 1. p. 541. *Ord. de la mar*. h. t. 52. and *Valin*, tom. 2. p. 134.

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but some express law or usage to the contrary can exempt the insurer (*a*).

Thus:—An insurance was made on three ships, the *Adelaide*, the *Adéle*, and the *Victor*, their stores, &c.: Upon two of them, '*At and from* L'Orient;' and upon the third, 'At, and from, and after, her arrival 'at *L'Orient*;' and upon all of them, 'To all ports, seas, and 'places whatsoever beyond, and on this side, the *Cape* '*of Good Hope* and *Cape Horn*, on the southern whale 'and seal fishery and trade, and until their arrival back 'at *L'Orient*.'—An action being brought on this policy, the loss was stated in the declaration to have happened by the ships, their stores, and provisions, being, by the authority of certain persons exercising the powers of government in *France*, at *Port Louis* with respect to one, and at *L'Orient* with respect to the two others, *arrested and restrained* from further prosecuting their voyages.— The

Rotch v. Edie, 6 T. R. 425, sup. 44.

A neutral ship and stores are insured *at and from* an enemy's port, and an embargo is there laid on by the enemy. This is an arrest of princes.—And if the embargo continue, the insured may abandon and recover as for a total loss.

(*a*) Some doubt seems to have been entertained on this point. *Roccus*, n. 65. says, "*Regis et principis factum connumeratur inter casus fortuitos; ideo, si rex et princeps retineant navem oneratam frumenta asportare ad locum destinatum, tenentur assecuratores*," This passage, and that which precedes it, plainly shew that the author meant a detention by the power under whose authority the ship was to sail. *Le Guidon*, c. 7. § 1. treating of abandonment, says, that the insured may abandon, "*quand il advient du tout ou de partie, ou bien avarie qui excede ou endommage la moitié de la marchandise*, quand il y a prise d'amis ou d'ennemis, *arrêt de prince, &c.*" The ord. of 1684. h. t. art. 52. contains these words. "*Si le vaisseau étoit arrêtè en vertus de nos ordres dans un des ports de notre royaume*, avant le voyage commencé, *les assurés ne pourront, á cause de l'arrêt, faire l'abandon de leurs éffêts aux assureurs.*" *Vaïn*, commenting upon this article, (vol. 2. p. 134). distinguishes the arrest of a foreign prince, from that made by order of the King of *France*; he also distinguishes an arrest in the port of loading, from an arrest in any other port of *France*, where the ship happens to put in; and he says that, only in the latter case, an arrest by the King is a ground to abandon. But *Pothier*, (h. t. n. 59). and after him, *Emerigon* (vol. 1. p. 541.) reject

The *Adelaide* sailed from *L'Orient* on the voyage insured, but was obliged to put back by stress of weather, into *Port Louis*, and on the 5th of *February* 1793, while she lay there, the *Adèle* and *Victor* were preparing for their voyages, and before the necessary passports and clearances could be obtained, an embargo was laid on all vessels in those ports. The *Adelaide* was brought back to *L'Orient*, the perishable stores of all three ships were sold, and the ships themselves, with the rest of the stores, remained at *L'Orient* under the embargo, which still continued on all ships destined for long voyages. The *Adèle* and *Victor* had entered outward upon their respective voyages, when the embargo came; and that alone prevented them from sailing. Notice of abandonment was given to the underwriters on the 27th of *February* 1793, and a total loss claimed, and the same repeated in *August* following. The plaintiff, who then resided in *England*, was a subject of the United States of *America*, and formerly resided several

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reject these distinctions, and maintain that the words, "*avant le voyage commencé*," mean before the *risk* is commenced; and that if the risk be commenced before the arrest, the insured may abandon, upon an arrest even in the port of loading. *Le Guidon*, however, (ch. 9. art. 6). contains these words: "*Si le prince arrêste le navire, comme s'il s'en vouloit servir; s'il avoit affaire de portion ou de toute la marchandise; s'il ne veut permettre aux navires de sortir qu'en flotte, ou rédoublement d'équipage, ou s'il prévoyoit à plus grand danger les arrestans pour quelque temps, l'assureur n'est en aucune indemnité quand telle chose avient dedans le même port, pour ce que ce sont* des dangers de la terre, *procedans du vouloir du prince*."—Upon this passage of *Le Guidon*, *Valin* (ubi sup) observes, that whatever may be the King's motive for stopping the departure of a ship, the insurer has no right to abandon, but must wait till the king has withdrawn his orders, and it may be considered as one of the extraordinary and unforeseen events by which a voyage may be prolonged beyond its usual time. Lord *Mansfield*, in *Goss* v. *Withers*, 2 *Bur*. 696. seems to have adopted the doctrine as laid down by *Roccus*, and followed by *Pothier* and *Emerigon*; namely, that the insured may abandon in the case of a mere arrest, or an embargo by any prince. Vid. infra, ch. 13.

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years in *London*, but for some years previous to the insurances in question, had dwelt at *L'Orient*, and was jointly concerned in the Southern whale fishery with Mr. *Berard* a native of *France*, resident at *L'Orient*, and whose interest was separately insured.—On the trial of the cause a special case, stating the above facts, was reserved for the opinion of the court, and it was contended on the part of the underwriters,—1st, That an embargo at the loading port to which the ship belonged, and where the insured owed a temporary allegiance to the governing power, was not a risk within the meaning of the policy, because like sea-worthiness, it is a condition necessarily implied in contracts of insurance, that the ship may legally sail from the loading port. 2dly, That there was no loss in regard to the subject-matter of the insurance, which is on the ship, &c. 3dly, That the plaintiff had no right to abandon as for a total loss, under the particular circumstances of this case.—The court, however, determined in favour of the plaintiff on all these points.—As to the *first*, they held, that the terms of the policy were sufficiently large to extend to this case; and that it was incumbent on the defendant to have shewn some case in which it was otherwise decided; but all the authorities, both *English* and foreign, were in favour of the plaintiff. That the plaintiff was not an alien enemy, but a native of *America*, then resident in *England*, and therefore under no disability to sue in this case, and the consequence of allowing this objection, would be to render it illegal to insure the property of a neutral, in an enemy's port. As to the *second* point, the court held that, as the insurance was not only on the ship, but on the stores, provisions, and fishing tackle, which were lost to the plaintiff; and as the voyage was lost in consequence of the detention of the ships, this was a loss within the policy, and a very different case from that of *Robertson* v. *Ewer* (*a*), to which it had been compared.—Upon the last point, the court was of opinion, that the plaintiff had as much right to abandon in this case, as in the case of a capture by an

(*a*) 1 T. R, 127. inf. c. 16. § 5.

enemy; and for this the doctrine of Lord *Mansfield* in *Goss* v. *Withers* (a) was much relied upon.

A seizure, after a cessation of hostilities, is an arrest of princes.

If a ship be seized after a cessation of arms and preliminary articles of peace are signed, this shall not be deemed a capture, but only an arrest of princes.

Spencer v. *Franco*, at N. P. *December* 1736, *Beawes* 4th edit. p. 316. (b).

An *English* ship is seized by the *Spaniards*, and converted by them into a ship of war: But it appearing that this was after a cessation of arms, and preliminary articles of peace signed, and the ship having been restored; this was held not to be a capture, but only a detention princes.

As, where the plaintiff had caused himself to be insured 'On the *Prince Frederick* from *Vera Cruz* to *London*, *interest or no interest*, free of average, and without benefit of salvage.'—The ship was afterwards seized by order of the Viceroy of *Mexico*, and the *Spaniards*, having taken out the *South Sea* Company's arms, and made several alterations in her, turned her into a ship of war, and sent her as commodore with a squadron of men of war to the *Havannah*, there being a war at that time between *England* and *Spain*; and *Gibraltar* was actually besieged by the *Spaniards*.—In an action on the policy (c), the defendants proved the signing of the preliminary articles of peace before the seizure of the ship, and therefore insisted that this seizure did not alter the property, and consequently the defendants were not liable: For if the property were not altered, this insurance, made by the plaintiff without interest, could not bind, as nothing came within the policy but a total loss: And though there be those general words, "*restraint, or detainment of princes.*" —Lord *Hardwicke* C. J. declared that a war might begin without an actual declaration or proclamation, as in this case, by laying siege to *Gibraltar*; that as a war might begin by hostilities only, so it might end by a cessation of arms; and these preliminary articles being signed before the seizure of the ship, and there being a cessation of arms, he thought the taking of the ship afterwards not to be a taking by enemies, unless the jury took the capture to begin from the time the *South Sea* arms were taken out,

(a) 2 *Bur.* 583. inf. c. 13. § 2.——(b) This case, which is found in the 4th edition of *Beawes* but not in the 5th, is so imperfectly reported that it cannot be much relied upon as an authority: Yet, being cited by Lord *Mansfield* in the case of *Hamilton* v. *Mendes*, 2 *Bur.* 1211, I thought it ought not to be passed unnoticed here——.(c) The plaintiff, it may be presumed, declared only upon a loss by *capture.*

which

which was before the preliminaries; that supposing the ship not taken by enemies, whether the detention for near a year was, in this sort of policy, viz *interest or no interest*, a detention within the policy; or whether, in such policies, the insurers are ever liable, but in case of a total loss; and if so, the ship being afterwards restored, he directed the jury to find for the defendants, which they accordingly did.

Sect. VI.

Of Loss by Barratry.

Barratry defined.

BARRATRY, which is derived from the *Italian* verb *barratrare* to cheat (*a*), may be defined to be any act committed by the master or mariners, for an unlawful or fraudulent purpose, contrary to their duty to their owners, and whereby the owners sustain an injury: As, by running away with the ship, wilfully carrying her out of the course of the voyage prescribed by the owners, sinking or deserting her, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss, or forfeiture. Barratry, in short, comprehends every fraud that may be committed by the master or mariners, to the detriment of the owners; and therefore, where the breach assigned in the declaration on a policy was, the loss of the ship, "by the *fraud and negligence* of the master," it was determined that this was a sufficient averment of a loss by barratry (*b*).

Whether insurance against barratry ought in all cases to be permitted.

At *Amsterdam*, *Hamburgh*, *Middleburgh*, and some other maritime towns, insurers are, *by positive law*, made responsible for the barratry of the master and mariners (*c*). At *Rotterdam* the owners of ships are prohibited from in-

(*a*) Its meaning, according to *Dufresne*, (Glos. verb. *Barratria*) is, "*fraus et dolus, qui fit in contractibus et venditionibus.*" ——(*b*) R. *Knight* v. *Cambridge*, 1 *Str.* 581. 2 Lord *Ray.* 1349, inf. ch. 16, § 2.——(*c*) 2 *Mag.* 73, 130, 215.

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ſuring againſt the barratry of the maſter whom they themſelves appoint. But they are permitted to inſure againſt his neglect, againſt the barratry of the ſailors, and of ſuch maſter as may ſucceed to the command in foreign parts without their knowledge, upon the deceaſe or abſence of the maſter originally appointed (*a*).

Lord *Mansfield* ſeems to have thought it extraordinary that barratry ſhould ever have crept into inſurances, and ſtill more that it ſhould have continued in them ſo long; "thus," ſays his lordſhip, "making the underwriter become inſurer of the conduct of the captain whom he does not appoint, and cannot diſmiſs, to the owners who can do either" (*b*).

Roccus (*c*) holds that the inſurer cannot be made liable for barratry, if the inſured be the owner of the ſhip; but if he only *charter* the ſhip, he may inſure againſt barratry; becauſe, in that caſe, the owner of the ſhip appoints the maſter. But where the owner of the goods appoints the maſter, it is holden that he cannot be inſured againſt the barratry of ſuch maſter (*d*).

In *France* the inſurer was formerly anſwerable, *ipſo jure*, for the barratry of the maſter (*e*). But, by the ordinance of the marine (*f*), this liability is confined to caſes, where the policy expreſsly includes barratry; and *Emerigon* (*g*) even inſiſts that the owner of the ſhip cannot be inſured againſt barratry of the maſter, becauſe he is himſelf anſwerable, according to the rule of the *Roman* law (*h*), for the conduct of the maſter whom he employs; and if the owner be himſelf anſwerable to third perſons

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(*a*) Vid. *Roccus*, n. 27, *Emerig.* tom. 1, p. 370.——(*b*) 1 T. R. 330.——(*c*) h. t. n. 44.——(*d*) *Quando navarchus poſitus eſt à domino mercium, tunc aſſecuratus ſibi debet imputare quod talem præpoſitum elegerit et aſſecurator non tenetur.* *Caſaregis*, diſ. 10, n. 14; diſ. 1. n. 75.——(*e*) Vid. *Le Guidon*, ch. 5, art. 6, ch. 9, art. 8, 12.——(*f*) h. t. art. 28.——(*g*) Vol. 1, p. 369.——(*h*) *Omnia facta magiſtri debet præſtare qui eum præpoſuit. ff.* l. 1, § 5, *de exercit.* act. *Ex delicto cujuſvis eorum qui navis navigandæ cauſâ in nave ſunt datur actio in exercitorem. id.* § 2.

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for the barratry of the maſter, he cannot, *as inſured,* throw this burthen on the inſurer who would have an immediate remedy againſt him, *as owner,* to recover back the ſame loſs; a circuity of action which would be abſurd.

Upon the ſame principle *Emerigon* alſo holds that if the captain be commiſſioned to diſpoſe of an adventure on board, the inſurer of ſuch adventure ſhall not be anſwerable for the loſs of it, occaſioned by the fault of the captain; for this would be, to make the inſurer anſwerable to the inſured for the faults of his own agent (*a*).

But the objections to the policy of permitting inſurances againſt barratry, in the caſe of the *owner of the ſhip,* however well founded, do not apply to the caſe of an inſurance of goods in a *general ſhip,* which carries the goods of every man who chuſes to put them on board, or of a *chartered ſhip,* hired to carry the goods of the affreighter; for, in either caſe, the owner of the goods does not appoint the maſter, nor has he any control over him or the ſhip. It is probable that caſes like this firſt gave birth to the practice of inſuring againſt barratry; and that this, in proceſs of time, was indiſcriminately introduced into all policies.

But even in the caſe of a *particular ſhip* freighted entirely by a ſingle perſon, it may in general be preſumed that if the inſurer do not know the maſter, or at leaſt his character, it is his own fault, as every policy ſpecifies the maſter; but then it is generally provided that any other perſon, at the election of the inſured, may go as maſter; and by permitting this clauſe to ſtand in the policy, the inſurer waves all perſonal knowledge of the maſter, and therefore no objection can fairly be made of the want of ſuch knowledge (*b*).

And though barratry cannot properly be called a peril of the ſea, becauſe it does not ariſe *ex marine tempeſtatis diſcrimine,* yet it is a riſk, and a very great one, incident to ſea voyages; becauſe merchants are obliged to confide

(*a*) *Emerig.* tom. 1, p. 370.——(*b*) Vid. *Roccus,* h. t. n. 27. *Cowp.* 153. Vid. ſup. 312.

their ſhips and merchandize to the care of mariners, who may ſometimes ſo far forget their duty, as to betray the important truſt repoſed in them. Unleſs, therefore, the merchant could be protected by inſuring againſt this riſk, few men of ſmall capitals would expoſe themſelves to it. For this reaſon the law, with us, permits even the owner of the ſhip to be inſured againſt the miſconduct of the captain and crew, though they are his own agents, and the perſons of his own choice.

The captain may be inſured againſt the barratry of the ſailors.

If the captain be inſured, no agreement on the part of the inſurers can make them liable for barratry committed by himſelf (*a*); but they may be liable, in ſuch caſe, for the barratry of the ſailors, in which he has no part (*b*).

Still, however, it muſt be owned that caſes ſometimes occur which tempt one to think that it might, perhaps, be the wiſeſt policy to impoſe ſome reſtraint upon unqualified inſurances by *owners of ſhips*, againſt this ſpecies of riſk. It would at leaſt have the effect of making them more circumſpect in the choice of the perſons to whom they confide ſo great a charge.

What ſhall be deemed barratry.

Valin (*c*), *Pothier* (*d*), and *Emerigon* (*e*), adopting the doctrine of *Le Guidon* (*f*), hold that barratry comprehends every fault, either of the maſter or mariners, by which a loſs is occaſioned, whether ariſing from fraud, negligence, unſkilfulneſs, or mere imprudence; and in this ſenſe it ſeems to be underſtood in the *French* ordinance of the marine (*g*).

But with us, no fault of the maſter or mariners amounts to barratry, unleſs it proceed from a fraudulent purpoſe in the maſter or mariners at the time (*h*).

A deviation not proceeding from fraud is not barratry.

Therefore if the maſter, from *ignorance*, *unſkilfulneſs*, or from any motive which is not *fraudulent*, depart from

(*a*) *Le Guidon*, ch. 15, art. 4; *Valin*, h. t. art. 27, p. 75; *Pothier*, h. t. n. 65.——(*b*) *Emerig.* tom. 1, p. 371.——(*c*) On art. 28, h. t. tom. 1, p. 79.——(*d*) h. t. n. 65.—— (*e*) tom. 2, p. 366.—(*f*) Ch. 5, art. 6, ch. 9, art. 1, 8.——(*g*) h. t. art. 28. ——(*h*) *Non omnis navarci culpa eſt barataria, ſed ſolum tunc ea dicitur, quando committitur cum praexiſtenti ejus machinatione et dolo praeordinato ad caſum.* *Caſaregis*, diſ. 1, n. 77.

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the proper course of the voyage; this will be a deviation which may avoid the policy, but it will not amount to barratry.

Phyn. v. Roy. Ex. Assur. 7 T.R. 505.

In a voyage from *London* to *Jamaica*, the captain loses his reckoning; and when he discovers his situation, instead of steering directly to *Jamaica*, bears up for an island out of that course:—This is a deviation, but being without any fraudulent intention, is not *barratry*.

Thus:—Goods were insured from *London* to *Jamaica*, and it appeared that the captain's instructions were to proceed immediately to *Jamaica*: But after the ship had cleared the *Channel*, she was carried by currents and other causes, out of her reckoning, till she was found to be between the *Grand Canary* and *Teneriffe*. From this situation her direct course to *Jamaica* was to the south-west, instead of which, the captain bore up from *Santa Cruz*, to the north-west about 30 miles, where she came to an anchor. There, an embargo was laid upon her; soon after which, news arrived of war having been declared between *Spain* and *Great Britain*, and the ship and cargo were seized and condemned as prize.—In an action on the policy, the declaration contained two counts; one for a loss by *capture*, the other for a loss by *barratry*. And it was contended on the part of the plaintiff, that he was necessarily intitled to recover on one count or the other. On the first, if there was no deviation; or, admitting that the ship's going to *Santa Cruz* instead of proceeding to *Jamaica*, after the captain knew with certainty where he was, was a deviation, still it was a wilful deviation by the captain, against his instructions, merely to procure a temporary refreshment, and no benefit to the owners, and therefore an act of barratry.—Lord *Kenyon*, who tried the cause, said, that it could not be barratry, without a fraudulent purpose in the captain at the time; and with that direction he left it to the jury, who found, "that "the captain's going to *Santa Cruz* was a deviation, and "was owing either to ignorance or something else, *but* "*that it was not fraudulent*;" and they accordingly found for the defendants.—Upon a motion for a new trial, the court were clearly of opinion that there must be *fraud* to constitute barratry; and as the jury had expressly negatived fraud, there could be no barratry.—Mr. Justice *Lawrence* said he knew of no case in which it is said that the act of the captain is barratry, merely because it is against the interest of the owners; it must be done with a *criminal intent*: That, in this case, the jury having nega-

tived fraud, had negatived criminality in the captain; and therefore this was not a barratrous deviation.

Whether barratry may be committed by the seamen without the participation, or against the will, of the captain.

In *France*, if by the policy the insured be protected against the barratry of the *master*, the underwriters are answerable for the misconduct of the *mariners* also; because the word master (*patron*) comprehends all the persons on board who are in the ship's pay (*a*). Our policies are more explicit, and distinctly specify barratry of the master and *mariners*. I should conceive, therefore, that with us, as in *France*, the mariners may commit barratry, without the concurrence of the master, or against his will. In the following case, however, Lord C. J. *Lee*, at *nisi prius* held, that a deviation to which the master was compelled by a daring act of violence and disobedience on the part of the seamen, did not amount to barratry, because the ship was not actually *run away with in order to defraud the owners*.

Elton v. *Brogden*, 2 *Str.* 1264. Sup. 212

A letter of marque has orders, in case she takes a prize, to send it home, and proceed on her voyage; but the master was compelled by the sailors to return back with the prize:—This is not barratry.

That was the case of a letter of marque, insured for a voyage 'from *Bristol* to *Newfoundland*.'—She sailed with express orders that, if she should take any prize, she should nevertheless proceed on her voyage, and that some hands should be put on board the prize, and sent with it to *Bristol*.—A prize was taken in the course of the voyage, and the captain ordered some of the crew to carry the prize to *Bristol*, while he proceeded on his voyage: But the crew opposed him, and insisted on his going back, though he acquainted them with his orders; and he was forced to submit, and on his return his own ship was taken.—The underwriters insisted that this was a deviation which discharged them. But the court and jury held, that this was occasioned by the force upon the master, which he could not resist; and that it therefore fell within the excuse of necessity, which had always been allowed. The plaintiff's counsel would have made barratry of it;

(*a*) *Les assureurs ne respondent pas des méfaits des mariniers a moins que par la police ils ne soient chargés de la baratterie du patron. Le mot patron comprêhend ici tous ceux qui sont aux gages du navire. Emerig. t.* 1. *p.* 381, 2. *Vid. Valin, tom.* 2. *p.* 3.

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but lord chief justice *Lee* thought that it did not amount to barratry, as the ship was not run away with *in order to defraud the owners:* Neither was it a case of wilful deviation, but of deviation occasioned by the force upon the master which he could not resist, and therefore excused by the necessity. The insurers were therefore held to be answerable, and the plaintiff had a verdict as for a loss by capture (*a*).

The learned judge who tried this cause, and who was in general a master of all the learning of his time on the subject of insurance, seems to have thought that nothing short of running away with the ship, with intent to defraud the owners, amounted to barratry. What the seamen did in that case was but one degree short of such a crime. In the following case, which we have already had occasion to mention, the conduct of the master was held to be barratry, though certainly much more venial than that of the sailors in the above case.

Moss v. *Byrom*, 6 T. R. 379. Sup. 283.

The master, without the proper authority, and contrary to his orders, cruises in quest of prize, this is barratry, though done for the benefit of the owners.

A ship was chartered for a voyage from *Liverpool* to the *Bahamas* and back, and on her return from the *West Indies*, letters of marque were taken on board, merely to entice seamen to enter, but without the necessary documents to give them validity, *and without any intention of cruising in quest of prizes;* and it was a part of his written instructions, before he sailed, to proceed to *Liverpool* with all expedition. A few days after the ship sailed, however, the captain, with the concurrence of the majority of the seamen, determined to cruise for prizes; and he soon fell in with an *American* whom he plundered and

(*a*) In an appeal from the *East Indies*, in a cause of *De Frise* v. *Stephens* at the Cockpit, 1st *July* 1800, Sir *R. P. Arden*, then Master of the Rolls, observing upon this case of *Elton* v. *Brogden*, said, he thought it must be ill reported in *Strange*; for, upon the facts stated, there could be no doubt but that the *mariners* had committed barratry, and that he was therefore inclined to think, as Lord *Mansfield* appeared to have done in commenting on this case in that of *Vallejo* v. *Wheeler*, that the policy must have been special, probably not including barratry of the mariners.

afterwards discharged. He then cruised for some days out of the course of the voyage, and captured a ship of the enemy which he sent to *Bermudas*, where he followed her himself, and there libelled her as prize in the court of admiralty, in the name of himself and *his owners*. But during his stay there his ship was stranded, and the cargo lost. He directed that the cruising should not be mentioned in the log-book.—In an action to recover as for a loss by barratry, it was contended on the part of the underwriters, that this could not be barratry, in as much as the act of the captain, however reprehensible in other respects, was done with a view to benefit, not to prejudice, his owners.—But the court held this to be barratry; and that the stopping and plundering the *American* ship was of itself an act of barratry in the master, independent of his taking the prize, this being contrary to his duty to his owners, and to their prejudice; because, by the charter-party, they had stipulated that the ship should sail directly to *Liverpool*, and they were therefore liable for any damage that might happen in consequence of any wilful deviation.—Mr. Justice *Lawrence*, in delivering his opinion, said, "It has been holden that whatever is done by the captain, to defeat or delay the performance of the voyage, is barratry in him, it being to the prejudice of his owners. And though he might conceive that what he did was for the benefit of the owners; yet, if he acted contrary to his duty to them, it was barratry."

Any illegal act, done by the master, without the authority of the owners, and to their detriment, is barratry, though done with a view of promoting their interest.

In the following case, which was determined in the Court of *King's Bench* upon great consideration, and in which Lord *Ellenborough*, in a very able judgment, took a masterly view of all the learning and authorities on this subject, it was determined that any illegal act done by the master, without the authority of the owners, and to their detriment, is barratry, though it be not done with intent to injure them, or to benefit himself, and even though it be done with a view of promoting their interest.

Earl v. Rowcroft, 8 *East* 126.

The master of an *African* slave ship, sails to an enemy's settlement on the coast

The ship *Annabella* was insured from *Liverpool* upon an *African* voyage, and, in an action on the policy to recover a loss by barratry, it appeared that the master, who was also supercargo, upon his arrival at *Cape Coast Castle*, a *British* settlement on the coast of *Africa*, began

to

to trade there; but, after a couple of days, receiving intelligence that he could barter his goods for ſlaves more advantageouſly and expeditiouſly at *Elmina*, a *Dutch* fort about ſeven miles to windward, he proceeded thither and there exchanged his goods, conſiſting, amongſt other things, of muſkets and gunpowder, for ſlaves, *Holland* being at that time at war with *Great Britain*, and he having letters of marque on board againſt the *French* and *Dutch*. After taking on board a number of ſlaves, the maſter, who was then on ſhore at *Elmina*, hearing that an *Engliſh* frigate was in ſight, ſent a note on board the *Annabella*, directing her to ſail immediately to *Cape Coaſt*; "*to prevent miſchief*," as he expreſſed himſelf; but, in her way thither, ſhe was purſued and ſeized by the *Engliſh* frigate, and ſent to *Jamaica*, where ſhe was condemned as prize, for having traded with the enemy (*a*). It further appeared, that it had been uſual to keep up a trading intercourſe between the *Engliſh* and *Dutch* ſettlements on this part of the coaſt, even in times of war between the mother countries, and that the maſter's object in going to *Elmina* was to complete his cargo as cheaply and expeditiouſly as he could; that when the ſhip was about to go to *Elmina* the ſurgeon aſked the maſter if there was no impropriety in going thither, to which he anſwered that they ſhould be ſoon off again, and nobody would know it; and it alſo appeared that, beſides his uſual wages, he had a commiſſion on the purchaſe and ſales, which he received at the end of each voyage.—The Court determined that

for the purpoſe of trading to more advantage than he could at a *Britiſh* ſettlement. For this his ſhip is ſeized by a *Britiſh* frigate, and confiſcated:—This trading was barratry.

(*a*) As to the illegality of trading with the enemy, vid. ſup. ch. 3. § 4. And with reſpect to the legality of capture and confiſcation for trading with the enemy, without the king's licence, ſee the caſe of the *Hoop*, 1 *Rob.* Adm. Rep. 196, with the authorities there cited, and the caſe of the *Odin*, id. 248; ſee alſo 2 *Rob.* Adm. Rep. 166, and the caſe of the *Coſmopolite*, 4 *Rob.* Adm. Rep. 10. And a trading by the ſubjects of an ally in the war, has been holden illegal, and a ground of ſeizure and confiſcation in our Courts of Admiralty. See the caſe of the *Nayade*, 4 *Rob.* Adm. Rep. 251. See 5 *Rob.* Adm. Rep. 254, 256.

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this trading with the enemy by the master, without the authority of the owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry.—Lord *Ellenborough* concludes his very able judgment by laying it down as clear law "That a breach of duty by the master, in respect to his owners, with a fraudulent or criminal intent, or *ex maleficio*, is barratry; that it makes no difference whether this act of the master be induced by motives of advantage to himself, malice to the owner, or a disregard of those laws which it was his duty to obey; and that it is not for him to judge or suppose, in cases not intrusted to his discretion, that he is not breaking the trust reposed in him, when he endeavours to advance the interest of his owners by means which the law forbids."

Barratry can only be committed against the owners, and therefore not *with their consent.*

Barratry can only be committed by the master and mariners by some act contrary to their duty, in the relation in which they stand to the owners of the ship. It is therefore an offence against them, and consequently an owner himself cannot commit barratry. He may, by his fraudulent conduct, make himself liable to the owner of the goods on board, but not *for barratry*. Neither can barratry be committed against the owner, *with his consent*; for though he may be liable for any loss or damage occasioned by the misconduct of the master to which he consents, yet this is not barratry. Nothing is more clear than that a man can never set up as a crime an act done by his own direction or consent. These points will be found fully established in the two following cases.

Stamma v. *Brown*, 2 *Str.* 1173.

A ship is engaged to carry goods straight to *Marseilles*; but instead of going thither direct, she goes first to *Genoa* and *Leghorn*: This being done by the authority of the owner, is not barratry.

In the first of these, it appeared that a ship being advertized to go to *Marseilles*, goods were shipped on board her, and the master signed a bill of lading, whereby he undertook to to go straight to that place, and the goods were insured, 'from *Falmouth*,' (where they were to be taken on board), 'to *Marseilles*.' Before the ship departed from the port of *London*, another advertisement was published for goods to *Genoa*, *Leghorn*, and *Naples*, and the plaintiff's

plaintiff's agent was told that it was intended to go to those ports first, and then come back to *Marseilles*; but he insisted that his bargain was to go directly to *Marseilles*; and he would not consent to let her pass by *Marseilles* or alter his insurance.—The ship, however, did pass by *Marseilles*; and after delivering her cargo at the other ports, set out on her return to *Marseilles* with the plaintiff's goods; but, in her voyage thither, was blown up in an engagement with a *Spanish* ship of war. The plaintiff declared as for a loss by the barratry of the master.—Lord C. J. *Lee* told the jury that this voyage, being against the express agreement to proceed straight to *Marseilles*, seemed to be more than a common deviation, as it was a formed design to deceive the plaintiff; and compared it to the case of sailing out of port without paying the duties, whereby the ship was subjected to forfeiture, which had been holden to be barratry. - The jury, after staying out some time, returned and asked the Chief Justice, whether, if the master was to have no benefit to himself by passing by *Marseilles*, and went only to the other places first, for the benefit of his owners, that would be barratry; and the Chief Justice answering, No, they found for the defendant.—On a motion for a new trial, the court after argument, were unanimously of opinion that the verdict was right: For the master had acted consistently with his duty to his owners, and the plaintiff's agent knew of the intended alteration, before the goods were put on board, and might have refused to ship them, or have altered the insurance; and to make it barratry, there must be something of a criminal nature, as well as a breach of the contract, but here, the breach being assigned only on the *barratry*, was not supported by the evidence.—Mr. Justice *Lawrence*, in delivering his judgment in the case of *Phyn* v. *Roy. Ex. Assur.* (*a*) says that, in this case, of which

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(*a*) 7 T. R. 508. See some further extracts of this note, and also of Mr. *Ford's* note of this case of *Stamma* v. *Brown*, 8 *East* 135-6.

he had a manuscript note, Lord C. J. *Lee*, in defining barratry, said, " Barratry must be some breach of trust in the master, *ex maleficio*."

Nutt v. *Bourdieu*, 1 T. R. 323.

After bills of lading are delivered to the owners of goods, the captain signs new ones, changing the destination of the ship; and the goods are disposed of for the use of the owner of the ship, and in fraud of the owner of the goods:—This being done with the concurrence of the owner, is not barratry.

The other was the case of an insurance effected on behalf of *Hague*, before he became bankrupt, on goods on board the *Ruchette* from *London* to *Rochelle*. It appeared that the master, *by the instigation and direction of* Le Grand, *the owner of the ship, went with the ship and cargo to* Bourdeaux, *instead of* Rochelle, *where the cargo was sold by the agent of* Le Grand: That a petition was presented by the insured to the admiralty of *Guienne*, stating that *Le Grand*, partner in a house at *Rochelle*, being in *London* with his ship, and in want of a cargo to return home, applied to *Hague*, who agreed to supply him with goods, which were loaded on board the ship, for account of *Le Grand*; that as *Hague* did not know the house of *Le Grand*, it was agreed between him, *Le Grand*, and the captain, that the bills of lading should not be delivered to *Le Grand* but at *Rochelle*, after he should have paid the amount to the agent of *Hague*, in good bills, and, in default, that the goods should be received by *Hague*'s agent for his account free from freight &c.; that the captain accordingly delivered bills of lading to *Hague*, who forwarded them, together with the contract, to his agent at *Rochelle*, with orders to receive the goods on the arrival of the ship, or deliver them to *Le Grand* if he should fulfil his agreement; that, upon the ship's arrival at the harbour of *Rochelle*, *Le Grand* went on shore, got secretly into the town, where, having consulted with his partners how to elude the precautions taken by *Hague*, returned on board and got the captain fraudulently to sign other bills of lading, by which he reserved to himself the liberty of putting into *Rochelle* or *Bourdeaux*, and by means of the false bills of lading, and by the contrivance of *Le Grand*, the goods were there put into the hands of *Le Grand*'s agent; that *Hague*'s agent on hearing of this, applied to the house of *Le Grand*, who gave him bills for the whole amount, but which were afterwards dishonoured; whereupon the agent attached the cargo in the hands of the several persons

who

who held it; that the houfe of *Le Grand* having delivered a falfe account to their creditors, a releafe was granted them from all attachments and executions, confirmed by the parliament of *Paris*, with an injunction to all perfons arrefting their goods to reftore them; that, in confequence of this petition, the court of admiralty at *Bourdeaux* decreed *that the captain was guilty of barratry*, for having figned falfe bills of lading, in order to change the voyage, and carry away the goods, for which they condemned him to the galleys for life, and declared *Le Grand* to be an *accomplice in the faid barratry of the mafter*, and guilty of *robbery* in caufing the fhip to be brought into *Bourdeaux*, and condemned him to the galleys for five years, and laftly, condemned the captain and *Le Grand* to pay the value of the goods, with the charges, &c.— The court were clearly of opinion that this could not be barratry, and that the plaintiff ought not to recover.—Lord *Mansfield* faid,—" The fentence of the *French* court of admiralty, which declared the mafter and owners to have been guilty of barratry, is entirely out of the queftion: For, though it was a moft righteous judgment, yet it was no part of the confideration of that court, what was meant by barratry in an *Englifh* policy. Their idea of barratry was manifeftly different from the conftruction put upon that word in our own courts; for they had found the *owner* guilty of barratry, which was entirely repugnant to every definition of barratry which had ever been laid down in an *Englifh* court of juftice. The point to be confidered is, whether barratry, in the fenfe in which it is ufed in our policies, can be committed againft any but the owners of the fhip. It is clear beyond contradiction that it could not; for barratry is fomething contrary to the duty of the *mafter* and *mariners*, the very terms of which imply that it muft be in the relation in which they ftand to the *owners of the fhip*. An owner, therefore, cannot commit barratry. He may make himfelf liable by his fraudulent conduct to the owner of the goods, but not as for barratry.. And, befides, barratry cannot be committed againft the owner *with his confent*: For though the owner may become

liable

liable for a civil loss, by the misbehaviour of the captain, if he consented, yet that is not barratry. Barratry must partake of something criminal, and must be committed *against the owner*, by the master or mariners."

If the same person be both owner and master he cannot commit barratry.

If the master of the ship be also the owner, he cannot commit barratry, because he cannot commit a fraud against himself. And even where he has mortgaged the ship, and the legal title is in another, and he has only the equity of redemption, yet he is still so far the owner, that he cannot commit barratry (*a*).

But a deviation without the knowledge of a general freighter, though with the consent of the owners, is barratry.

It is not, indeed, against the person possessed of the mere legal title to a ship, that barratry may be committed; it may be committed against a general freighter, in respect of his temporary power over that ship during a given voyage; and a deviation for an illegal purpose, without his knowledge or consent, will be barratry, though it be with the consent of the original owner.

Vallejo v. Wheeler, Cowp. 143.

As where goods were insured in the common form, 'From '*London* to *Seville*, with liberty to touch at any ports or 'places, &c.'—In an action on the policy, the loss was alledged different ways in the declaration; *first*, that the ship by storms and perils of the sea, was forced to go to *Dartmouth* to be repaired; and that afterwards a further loss happened by storms, &c.; *secondly*, that it happened by storms, &c. in the voyage generally; and *thirdly*, by the *barratry of the master*.—At the trial it appeared, that the ship was put up as a general ship from *London* to *Seville*, and was let to freight by one *Willes* to *Darwin* (*b*); that it is the course for vessels going on this voyage, to stop at some port in the west of *Cornwall*, to take in provisions; that this ship having taken her cargo on board, sailed from *London* to the *Downs*, and while she lay there, all the other

(*a*) *Semb.* per Lord Chancellor *Hardwicke*, *Lewin* v. *Suasso*, *Post. Dict.* vol. 1, p. 147.——(*b*) Mr. *Cowper*'s report of this case states *Darwin* to have chartered the ship to *Brown*, his captain. Mr. Justice *Buller* in 1 T. R. 330, says, that the error should be corrected by stating that the ship was chartered by *Brown* to *Darwin*, and not by *Darwin* to *Brown*. But it appears by the subsequent part of the report, that *Willes* chartered the ship to *Darwin*.

ships

ſhips bound to the weſtward bore away, but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was out of the courſe of the voyage; that the captain went there for his own convenience, to take in brandy and wine on his own account, after which he intended to proceed to *Cornwall*; that the night after the ſhip quitted *Guernſey* ſhe ſprung a leak, which obliged her to put into *Dartmouth*; that when ſhe was refitted, ſhe ſailed again, and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop and take in proviſions, but in her way thither, ſhe received further damage, and at her arrival was totally incapable of proceeding on the voyage; and that the goods inſured were much damaged. —It was attempted, on the part of the defendant, to prove that the voyage to *Guernſey* was on account of *Willes*, the owner of the ſhip, and that the goods taken on board there were his property: But this evidence went little farther than information and belief, except that, when the ſhip arrived at *Helford*, the wine was delivered into his cellar.—Mr. Juſtice *Aſhurſt*, who tried the cauſe, told the jury that, if the going to *Guernſey* was without the knowledge of *Darwin*, it was barratry; and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: And if they ſhould be of opinion that it was without the knowledge of *Darwin*, then, he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not (*a*). The jury found for the plaintiff, and ſaid they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowledge of *Willes*.—Upon a motion for a new trial, two queſtions were made: *Firſt*, Whether the conduct of the maſter, in going to *Guernſey*, for

(*a*) There ſeems to be ſome error in this part of the report. The firſt part of the direction of the learned judge *takes it for granted* that *Darwin* was the owner. If ſo, it could not be material to enquire whether the deviation was with, or without, the knowledge of *Wllies*. It would ſeem, from the finding of the jury, that it had been left to them to ſay which of the two was the owner.

the purpose, and under the circumstances above stated, was barratry: Supposing this to be barratry, then *secondly*; whether, to entitle the plaintiff to recover, the loss must not have happened during the continuance of the barratry, or have been occasioned immediately by the act of barratry: Here the goods were not seized for smuggling, nor did the loss happen till after the act of barratry.—The court, after two arguments, were unanimously of opinion that this was barratry.—They said, that if a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the ship would have the direction of her, and the hiring of the master and mariners; that though *Willes* was originally the owner, and not being the insured here, every thing relating to him might be laid out of the case, and that the jury, therefore, did right in considering *Darwin* as owner *pro hac vice*; that *Darwin* being the freighter and owner of the goods on board, any fraud committed on the owner, must be committed on him; that the master had agreed to go on a voyage from *London* to *Seville*, and *Darwin* trusted he would set out immediately, instead of which, he went on an iniquitous scheme, totally distinct from the purpose of the voyage to *Seville*, which was a cheat and a fraud on *Darwin*, and was therefore barratry; that barratry is not confined to the running away with the ship, but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or *freighters* are injured; that whether the loss happened in the act of barratry, that is, *during* the fraudulent voyage, or after, was immaterial, because the voyage was equally altered even though there was no other iniquitous intent; independently of this, the judges seemed to think that the loss, in the present case, was sustained *in consequence* of the alteration in the voyage; that the moment the ship was carried from her right course, it was barratry, and the loss happened in consequence; but that, supposing the loss to have happened *afterwards*, the insured, if not protected against the barratry of the master, would have lost his insurance by the fraud of the master; for it was clearly a deviation, and he could have no remedy

remedy against the underwriters for a loss in consequence of a deviation.

Hence it would seem that, if barratry be once committed, every subsequent loss or damage may be ascribed to that cause; and that the underwriters are liable for it, as for a loss by barratry.

It is sufficient to prove that the master committed barratry, without shewing *negatively*, that he was not owner, &c.

Though it is a maxim in law that fraud shall never be presumed, but must be strictly proved; and it is a rule, in questions of insurance, that he who charges barratry, must substantiate it by conclusive evidence (*a*); yet, in the following case, it was determined that proof of the master's having carried the ship out of the regular course of the voyage, for fraudulent purposes of his own, is *primâ facie*, sufficient to entitle the plaintiff to recover; without shewing, *negatively*, that he was not the owner, or that any other person was the owner, or that this was not done with the owner's consent.

Ross v. *Hunter*, 4 T R. 33.

Goods are insured from *Jamaica* to *New Orleans*, and the master anchors in the mouth of the *Mississipi*, goes up to that place in his boat for a fraudulent purpose, and on his return, stands away for the *Havannah*:—Proof of these facts is sufficient evidence of barratry, without shewing negatively that he was not owner or general freighter.

Thus:—Goods were insured on board the *Live Oak*, *Joseph Rati* master, 'At and from *Jamaica* to *New Orleans*.'—In an action on the policy, there were two counts in the declaration; the first alledging a loss by the barratry of the master; the second by the perils of the sea.—Upon the trial, it appeared, That the ship was put up as a general ship at *Jamaica*, that she sailed on the voyage insured in *May* 1783; that the plaintiff, amongst others, shipped the goods in question, and in *June* following, arrived in the mouth of the *Mississipi*, which leads up to *New Orleans*, in *Spanish America*, at the distance of 35 leagues; that when the captain had got thus far, he dropped anchor, and went in his boat up the river to *New Orleans*, and, on his return, without carrying the ship to her port of destination, stood away for the *Havannah*, after which he was never heard of; that he had a private adventure of negroes of his own on board, which there was reason for supposing he intended to dispose of at *New Orleans*; but that, finding it difficult to do

(*a*) *Barataria crimen nunquam est præsumendum sed concludentissime probandum. Casaregis*, disc. 1, n. 60; disc. 225, n. 99; disc. 226, n 6. Vid. *Emerig.* tom. 1, p. 372.

so, on account of an interdiction by the *Spanish* government against the importation of them there, he went to the *Havannah* in quest of a market for them.—The defendants insisted that, upon the first count, there was no evidence to shew that the captain was guilty of barratry; for *non constat* that he was not himself the *owner* or *general freighter* of the ship; or if not, that he had acted contrary to the directions of the owner in going out of the original course; and that, as to the second count, there was a clear deviation which discharged the underwriters.—Lord *Kenyon*, who tried the cause, was of of opinion that barratry was sufficiently proved, and that therefore the plaintiff was intitled to recover on the first count, and the jury found accordingly.—Upon a motion for a new trial, the court were clearly of opinion that the evidence was sufficient to support the verdict. The ship was a general ship, of which *Rati* was proved to be *captain*, which is *primâ facie* evidence that he was not *owner*. There was no proof of his being owner; and if that fact were necessary to constitute the defence of the underwriter, the affirmative proof lay upon him. For the same reason, if *Rati* had been general freighter, that ought to have been proved by the defendant.—Mr. Justice *Buller* also held, that the very dropping of the anchor in the mouth of the *Mississipi*, being with a fraudulent view, was an act of barratry.

Even dropping anchor with a fraudulent view is an act of barratry.

Though the words '*in any* '*lawful trade*' be inserted in a policy, the insurer is liable, if the captain commit barratry by *smuggling*.

If a ship be insured for a term, *in any lawful trade*, and barratry be one of the risks mentioned in the policy, the underwriters are answerable for the barratry of the master by smuggling; for *lawful trade* in the policy means the trade in which the ship shall be employed by the owners, and not any unlawful commerce in which the captain may be engaged without their concurrence.

Blankley v. *Winstanley*, 3 T. R. 279.

As, where a ship was insured for twelvemonths, '*in* '*any lawful trade*, to commence on her sailing from '*Sunderland*.'—The declaration alledged, that the ship sailed *in a lawful trade* from *Sunderland*, and afterwards sailed on a voyage from *Ostend* to *Sunderland*, but put into the port of *Shields*, where the master, *in a barratrous and fraudulent manner*, *without the knowledge or consent of the owner*, did fraudulently and barratrously, import from *Ostend*,

Ostend, a quantity of smuggled goods, whereby the ship became forfeited, and was seized.—To this the defendant demurred, and insisted that, as the insurance only extended to losses which the ship might sustain in a *lawful trade*; the underwriter could not be liable for any loss occasioned by an *unlawful trade*, whether it proceeded from the act of the master or owner; and that the barratry insured against was such as might happen in a lawful trade, as by deserting, sinking, or running away with, the ship.—But the court determined that if the owner conducted himself with propriety, he was entitled to be indemnified against all the perils insured against in the policy; and that the words "*any lawful trade*" in the policy meant the trade in which the ship was employed *by the owners*.

The insurer will not be liable unless the loss happen during the voyage, though barratry was committed before.

Every loss must appear to be a direct and immediate consequence of the cause to which it is ascribed by the insured. We have seen, however, in the case of *Vallejo* v. *Wheeler* (*a*), that whether the loss happen during the act of barratry, or after it, is immaterial. Yet, if a loss do not happen within the time prescribed by the policy for the duration of the risk, the insurer will not be liable for it, though it be the undoubted consequence of the barratry.

Lockyer v. *Offley*, 1 T. R. 252; Sup. 174.

As where a ship was insured from *Hamburgh* to *London*; and it appeared that, in the course of the voyage, the master committed barratry, by smuggling on his own account, on the *English* coast; that on the 1st of *September* 1785, the ship arrived at her moorings in the *Thames*, where she remained in safety till the 27th, when she was seized for the smuggling, and the owners, upon their petition, had leave to compound for a sum of money.—Upon this case it was determined that though, by the excise laws, the forfeiture attaches the moment the offence is committed, and the ship may be seized at any time afterwards, and that the barratry was committed *during the voyage*; yet, that the underwriters were not liable for this loss; for the law of insurance would be left unsettled, if the liability of the insurers were to be

(*a*) Sup. 528.

continued for any other time than that prescribed by the policy.

How barratry shall be punished.

The offence of barratry, so mischievous in itself, and so injurious to commerce, is punishable as a public offence, according to the degree of guilt of the offender, by every commercial state in *Europe*.

in *France*.

In *France*, any fraud practised by the master or mariners, with or without the privity of the owners, and frauds committed by the owners themselves, are, as we have already seen, accounted barratry, and are punished with exemplary severity. It appears by the case of *Nutt* v. *Bourdieu* (a), that the captain of a ship was sentenced to the gallies for life for signing false bills of lading, in order to change the voyage and carry away the goods; and that the owner, who was convicted of being an accomplice in this crime, and of robbery in causing the ship to be carried to a wrong port, and converting the goods on board to his own use, was sentenced to the gallies for five years.

How offences of this nature are punished by the laws of this country, will be shewn in the last section of the present chapter, where the subject of fraudulent losses in general will be considered.

Sect. VII.

Of Loss by Average Contributions.

THE subject of average is a branch of marine law which does not necessarily make a part of the law of insurance: But as insurers, by the general words of most policies, are liable to indemnify the insured against those contributions which are properly denominated *general average*, this subject must often incidentally occur in the consideration of partial losses. It will therefore be necessary, in this place, to take a cursory view of the doctrine of averages, and of the regulations by which they are generally understood to be governed.

(a) 1 T. R. 323, sup. 450.

Average (*a*) is a term uſed in commerce to ſignify a contribution made by the owners of the ſhip, freight, and goods on board, in proportion to their reſpective intereſts, towards any particular loſs or expence ſuſtained for the general ſafety of the ſhip and cargo; to the end that the particular loſer may not be a greater ſufferer than the owners of the ſhip and the other owners of goods on board. Thus, where the goods of a particular merchant are thrown overboard in a ſtorm, to ſave the ſhip from ſinking, which may be lawfully done (*b*); or where the maſts, cables, anchors, or other furniture of the ſhip are cut away or deſtroyed, for the preſervation of the whole (*c*); or money or goods are given as a compoſition to pirates to ſave the reſt; or damage is ſuſtained in defending the ſhip againſt an enemy or pirate; or a ranſom, (when that is legal), is agreed to be paid to an enemy or pirate for liberating the ſhip; or an expence is incurred for phyſic and attendance in curing the officers or ſeamen wounded in defence of the ſhip; or in reclaiming the ſhip, or defending a ſuit in a foreign court of admiralty, and obtaining her diſcharge from an unjuſt capture or detention; in theſe and the like caſes, where any ſacrifice is deliberately and voluntarily made, or any expence fairly and *bonâ fide* incurred, to prevent a total loſs, ſuch ſacrifice or expence is the proper ſubject of a general contribution, and ought to be rateably borne by the owners of the ſhip, freight, and cargo, ſo that the

Average what.

In what caſes average contributions become payable.

(*a*) Average is derived from the Latin word *averagium*, which comes from the verb *averare* to carry, and originally ſignified a ſervice which the tenant owed to his lord, by horſe or carriage. It is ſaid to have been introduced into commerce to ſhew the proportion and allotment to be paid by every man according to his goods *carried*. *Cowel.*——(*b*) 12 Co. 63, *Mouſe's* caſe.——(*c*) *Si arbor vel aliud navis inſtrumentum, removendi communis periculi cauſâ dejectum eſt, contributio debetur.* ff. l. 14, *de leg. Rhod. de jact.* Vid. *Molloy*, b. 2, c. 2, § 6. But if the loſs of the maſts, anchors, ſails, &c. be occaſioned by mere ſtreſs of weather, this is not a general average, but the loſs falls on the owner. *Le Guidon*, ch. 5, art. 20. Vid. caſe of the *Copenhagen*, 1 *Rob.* Adm. Rep. 289.

loſs

loss may fall equally on all, according to the equitable maxim of the civil law,—*Nemo debet locupletari alienâ jacturâ.* The application of this principle was understood by the *Rhodians*, whose regulations on this subject were adopted into the *Roman* law, and make an important head in the *Digest*, under the title, *De lege Rhodia de jactu* (*a*). The leading principle of which is,—*Omnium contributione sarciatur, quod pro omnibus datum est.—Æquissimum enim est, commune detrimentum fieri eorum qui propter amissa res aliorum, consecuti sunt ut merces suas salvas habuerunt* (*b*).

General average.

Upon this principle is founded the doctrine of average contributions, the regulations of which make a necessary part of every system of maritime jurisprudence (*c*). Average, when understood in this sense, is called *general*, or *gross* average, because it falls generally upon the whole or gross amount of the ship, freight, and cargo; and also to distinguish it from what is often, though improperly, termed *particular average*, but which, in truth, means a particular, or partial, and not a general, loss, and has no affinity to average properly so called.

Particular average.

Petty average.

Beside these, there are other small charges called *petty* or *accustomed* averages. Such as pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, river-charges, signals, instructions, castle-money, pier-money, digging the ship out of the ice, &c. When these petty charges are incurred in the usual course of the voyage, they are not considered as a *loss* within the meaning of the policy, but only *a necessary and ordinary expence*: But if incurred for any extraordinary purpose in the voyage, as to provide against any impending danger, or in consequence of the ship's being driven out of her course by stress of weather; they will then be deemed gross or general average, for which the insurer will be liable (*d*)

The usual petty averages are not a charge on the insurers, unless in cases of general danger.

(*a*) ff. lib. 14, tit. 2.——(*b*) ff. *lib.* 14, *de leg. Rhod. de jact.*—(*c*) Vid. Mo. 297. *Show.* Ca. Parl. 19. *Beawes* lex merc. 148, 1 *Mag.* 64; 2 *Mag.* 96, 183, *Molloy*, b. 2, c. 2, § 6, 12, ff. lib. 14. *de leg. Rhod.* art. 9. Laws of *Wisb.* art. 20. Laws of *Ol.* art. 8. See also the ordinances of the different commercial states, as collected by *Magens.*——(*d*) Vid. 1 *Mag.* 72. 2 *Mag.* 278. *Pothier*, h. t. n. 67.

A contribution upon a general average can only be claimed in cases where, upon as much deliberation and consultation between the captain and officers as the occasion will admit of, it appears that the sacrifice, at the time it was made, was absolutely and indispensably necessary for the preservation of the ship and cargo. Some have even gone farther, and have said, that the saving of the ship and cargo must *appear* to have been in fact owing to such sacrifice (*a*). But this, beside being in most cases incapable of proof, is quite unreasonable and unjust.

General average can only be claimed where the sacrifice was absolutely necessary.

A loss which does not evidently conduce to the preservation of the ship and cargo, is not a proper ground for an average contribution: As if a pirate having made himself master of a ship and cargo, take only the goods of a particular person (*b*), or if some particular goods be damaged in a storm; in such cases the rest shall not be contributory (*c*). So, if upon the apprehension of an enemy, some goods are landed and secured on shore, and the rest taken; the owner of the goods taken shall not have average of the goods saved; for the salvage of these is not the cause of the taking of the rest; neither was the taking of those the cause of the salvage of the goods saved (*d*).

And where it conduced to the preservation of the ship.

So, it must appear that the ship and the rest of the cargo were in fact saved: For if goods be thrown overboard in a storm, and the ship afterwards perish in the same storm, there shall be no contribution of the goods saved, if any; because the object for which the goods were thrown overboard was not attained. But if the ship be preserved by the *jettison*, or throwing goods overboard, and continue her course, but is afterwards lost; the effects saved from this last misfortune, if any, shall contribute to the loss sustained by the jettison; because to that their preservation was once owing (*e*).

And where the ship was in fact saved.

(*a*) *Beawes* 148. —— (*b*) *Mal.* lex merc, 109.——(*c*) R. *Mo.* 297.——(*d*) R. *Show*, Ca. Parl. 20. ——(*e*) 2 *Mag.* 98, 240. Ord. *Louis* XIV. tit. contrib. art. 15, 16. Semb. cont. 1 *Mag.* 56. Vid. *Show.* Ca. Parl. 20. *Mo.* 297.

If goods, put into lighters to enable a ship to get up a river, be lost, the rest shall contribute. But if the ship be lost, the goods in the lighters shall not contribute.

Upon the same principle, if a ship, upon her arrival at the mouth of a river or harbour, be found too deeply laden to get over a bar, or to sail up, and the captain, to lighten her, put part of her cargo into lighters, and these lighters are lost; the owners of the ship and the remaining goods shall contribute to this loss; because the removal of part of the cargo from the ship into the lighters was for the general benefit. But should the ship be lost, and the lighters be saved, the owners of the goods preserved in the lighters shall not contribute to this loss; because the ship could not be said to have been lost for the preservation of the goods in the lighters, and because it is a general rule that a contribution is only due when the ship and the remaining cargo have been preserved from the peril to which they were exposed (*a*).

Whether the wages, &c during an unlawful detention, be a general average.

If a ship be unjustly captured and carried into a foreign port, it is said that, not only the charge of reclaiming her, but also the wages and expences of the ship's company during the detention, shall be brought into a general average (*b*).

The question, whether the wages and provisions of the ship's company, during an embargo or detention by the authority of the state, either at the port of departure, or at a foreign port, be a general average, has not yet been determined. The principle of the *Rhodian* law does not apply to such expences, because the detention does not proceed from the act of the master, or conduce to the general benefit. Mr. Justice *Buller*, in the case of *Da Costa* v. *Newnham* (*c*), speaking of the expence of wages and provisions during an embargo, thus expresses himself, —"The court has said, that these charges shall fall upon the owners only, and the freight must bear them."

Whether such charges, where a ship is forced to go into port to refit, be a general average.

In *Beawes's Lex Mercatoria* (*d*), it is said that, where a ship is forced to enter a port to repair the damage she has suffered in a storm, being unable to continue her voyage without apparent risk of being lost, the wages and pro-

(*a*) Vid. 1 *Mag.* 56. *Malyne*, 109, 110.——(*b*) *Beawes*, 166, 1 *Mag.* 67. Vid. Ord. of *Louis* XIV. tit. *Avaries*, art. 7.——(*c*) 2 T. R. 407. inf. ch. 13, § 2.——(*d*) 166.

vifions

visions for the crew, from the day it was resolved to seek a port to refit the vessel, to the day of her departure from thence, with all the charges of unloading, reloading, anchorage, pilotage, and every other expence incurred by this necessity, shall be brought into a general average.

The doctrine here laid down, is not warranted by the authorities upon this subject which we are taught to look up to with the greatest respect. A case similar to the case here put will be found in the *Digest*, where it is stated that a ship, in a voyage to *Ostia*, met with a violent tempest, and having her rigging, masts, and yards destroyed by lightning, she was forced to put into *Hippo* in great distress. There she underwent a complete repair, and had all necessaries provided for her; and having put to sea again, she arrived at *Ostia*, and delivered her cargo in good condition. It was made a question, whether the owners of the cargo ought to contribute to make good the damage which the ship had sustained? The answer was in the negative; because the expence incurred at *Hippo* was rather to repair the ship, and put her in a condition to resume her voyage, than to preserve the cargo (*a*).—All the modern writers on this subject adopt this decision, and hold it to be the clear law (*b*). But though there has never yet been any solemn decision on this point in any of the courts of *Westminster*, the above doctrine, as laid down in *Beawes*, seems to have been countenanced by judges of great authority.

The negative clearly laid down in the *Rhodian* law.

As, where an action was brought upon a policy on a ship, to recover the amount of wages and provisions

Leatward v. *Curling*, at N. P. after Trin. 1776. *Park* 125.

Upon a policy on the ship, wages while the ship was under a repair, not occasioned by any extraordinary accident, cannot be recovered.

(*a*) *Navis, adversa tempestate depressa, ictu fulminis deustis armamentis, et arbore et antenna Hipponem delata est; ibique tumultuariis armamentis ad præsens comparatis, Ostiam navigavit, et onus integrum pertulit. Quæsitum est, an hi, quorum onus fuit, nautæ pro damno conferre debeant.—Respondit, non debere hic enim sumptus instruendæ magis navis quàm conservandarum mercium gratiâ factus est. ff. de leg. Rhod. de jactu,* lib. 14, 2, 6.—(*b*) Vid. *Vinnius leg. Rhod.* p. 266, *Kuricke*, p. 774, *Loccenius*, lib. 2, c. 8, *Roccus de navib.* not. 59, *Emerig.* tom. 1, 624, and the other authorities there cited.

expended

expended during the time she went from *Bengal* to *Bombay* to repair;—Lord *Mansfield*, as he frequently did afterwards on similar occasions, held that, as the insurance was on the *ship* only, and the claim was for *wages*, the action could not be maintained. But he said, that there might be cases where exceptions to the general rule ought to be allowed; but that, in order to consider a case as *excepted*, it must appear that the expence was absolutely necessary, and occasioned by some of the perils mentioned in the policy.

But there may be exceptions to this rule.

If a ship be obliged to put into port to repair, the charges of unloading and reloading the cargo, and the expences of the repair, are a general average.

In the case of *Da Costa* v. *Newnham* (*a*), Mr. Justice *Buller* cites the above passage from *Beawes*, and though it was not necessary, he said, to determine that point then, he seemed disposed to concur in it. It was there determined, however, that where a ship is obliged to put into a port to repair, and this is necessary for the safety of the whole concern, the charges of unloading, reloading, and taking care of the cargo, and also *the wages and provisions of the workmen hired for the repair*, become a general average. This decision, which, with great deference, seems not to have been sufficiently considered, comes very near, in principle, to the doctrine in *Beawes*: The only difference consists in this, that *Beawes* allows the wages and provisions of the seamen, during the interruption, to be brought into a general average; but in the above case, the crew were discharged at the place where the ship was repaired, and therefore it was unnecessary to decide that point (*b*).

Yet, damage occasioned by wear and tear, or stress of weather, is not a general average.

Still, the leading principle of law is, that no injury occasioned by wear and tear, or by the winds or waves, in the ordinary course of the voyage, shall be the subject of general average. As if the ship be damaged in her hull; if her sails are blown away or destroyed, or her masts, yards, cables, &c. are broken by the violence of the winds and waves, the loss must fall on the owner alone (*c*).

(*a*) 2 T.R. 407, post. ch. 13, § 2.——(*b*) See the case of the *Copenhagen*, 1 *Rob.* Adm. Rep. 494. in which Sir *W. Scott* held that the expences of unloading and reloading the cargo, for the purpose of a repair, is a general average.——(*c*) ff. lib. 14. t. 2. *de lege Rhod. de jactu*, § 1. *Roccus* not. 60, Laws of *Oleron*, 9, of *Wisb.* 12.

For

For the ſhip is like the tool or inſtrument of a workman in his trade. If, in doing his work, he break his hammer, his anvil, or any other inſtrument, he can claim no ſatisfaction for this from his employer. '*Si conſervatis mercibus, deterior facta ſit navis, aut quid exarmaverit, nulla facienda eſt collatio: Quia diſſimilis earum rerum cauſa ſit, quæ navis gratia parentur, et earum pro quibus mercedem aliquis acceperit. Nam et ſi faber incudem aut maleum fregerit, non imputaretur ei qui locaverit opus: Sed ſi voluntate vectorum, vel propter aliquem metum, id detrimentum factum ſit, hoc ipſum ſarciri oportet* (*a*).

In favour of *Beawes*'s doctrine it may be plauſibly urged, that, as the repair is neceſſary to the completion of the voyage, and therefore for the general benefit of the whole concern, all ought to contribute to the expence. But, in anſwer, it may be contended with better reaſon, and upon ſounder principles, that when the owner takes goods on board upon freight, he not only engages, by the uſual terms of the charter-party, 'that the ſhip ſhall be tight, ſtaunch, and ſtrong, and furniſhed with all neceſſaries for the intended voyage,' but alſo that, '*during the courſe of the voyage*, the ſhip ſhall be *kept* tight and ſtaunch, and furniſhed with ſufficient men, and other neceſſaries, to the beſt of the owner's endeavours.' And this is no more than the law requires of every owner who takes goods on board, without a charter-party. If, therefore, the ſhip be ſo damaged as to be incapable of proceeding on the voyage, the owners are bound to have another ſhip, if one can be procured, to carry the goods to the port of delivery; but it was never pretended that the hire of this new ſhip is a ſubject of a general average. The following caſe, though upon the conſtruction of a charter-party, is not inapplicable to this ſubject.

Jackſon v. *Charnock*, 8 T. R. 509.

A ſhip is obliged by neceſſity to put into a port to repair: The expences of this repair are not a general average; the owner being bound to keep the ſhip in repair during the voyage.

A ſhip, chartered for a voyage to the *Eaſt Indies* and back, ſprung a leak on her homeward paſſage, which obliged her to put into the *Cape of Good Hope*, and there take out her cargo, in order to her being repaired. Upon the ſhip's return, the owners claimed from the freighter a payment in nature of general average, towards the expence

(*a*) ff. l. 14, tit. 2, de leg. *Rhod.* de jact. § 2.

pence of the repair, the maintenance of the crew, and other charges occasioned by the necessity of the repair.—But the court held that, by the terms of the charter-party, the owners were to keep the ship in repair during the voyage, at their own expence; and that the freighter was to be liable for general average only in the case of jettison; and therefore the plaintiff was not entitled to recover any thing for the expences incurred at the *Cape*.

Particular average.

If a ship spring a leak in a storm, by which goods on board are spoiled; this is a simple or particular average, or particular loss, and not the subject of an average contribution (*a*).

But any injury voluntarily done to the ship or her tackle, for the general safety, is a general average.

But if damage be voluntarily done to the ship, by cutting her sides or deck to facilitate a necessary jettison, or by running her on shore to avoid an enemy, or the danger of a storm (*b*); or if the captain, compelled by necessity, cut away and abandon his masts, or any other part of the rigging or furniture, to lighten the ship in the moment of distress; the loss and expences occasioned by these sacrifices must be made good by contribution. In the same manner are defrayed the port duties and other charges occasioned by taking a ship into a port, to avoid an impending peril, and the expence of extraordinary assistance there (*c*).

Birkley & others v. *Presgrave*, 1 *East* 220.

The owners of the ship may maintain an action against the owner of goods on board, to recover a contribution for sacrifices of the ship's tackle, and expences incurred, to save the goods.

Therefore, where the captain cut the ship's cable and made other sacrifices of the ship's tackle and furniture, to prevent her from being cast away in a storm; and also employed, and paid a number of men to keep the ship, which had been damaged in the storm, free from water in order that a cargo of corn, which was then on board, might not be damaged; it was determined that this was a general average, and that the owner of the ship might maintain an action at law, against the owner of the corn, to recover his contribution.

(*a*) *Consolato del mare*, ch. 63, vid. also ch. 193; 194. *Le Guidon* ch. 5, art. 20. Laws of *Wisbuy*, art. 12. *Recueil de* nav. n. 59.——(*b*) ff. ut sup. 14, 2, 3, and 5. 1. R. *Marsham* v. *Dutrey*, Select Ca. of Evidence, 58——(*c*) Laws of *Wisb*. art. 55. *Beawes*, 165, *Molloy*, b. 2, ch. 6, § 5. *Wellwood*, tit. 20.

But,

But, where a ship was captured by a privateer, but, on account of a heavy gale, and the sea running high, the privateer could not take possession of her, and the ship, availing herself of this, effected her escape; but in doing so, carried such a press of sail, that she was much strained, most of her seams were opened, and the head of her main-mast carried away.—In an action on a policy on this ship, the defendant paid 4 l. *per cent.* into court, and contended that, as the injury to the ship had been occasioned by an exertion which had the effect of saving both ship and cargo, it ought to be considered as a *general average*; and that the proportion of this which would fall on the ship would be more than covered by the money paid into court, and cited the above case of *Birkley* v. *Presgrave*, wherein Lord *Kenyon* says,—"All the articles which were made use of by the master and crew, upon the particular urgency, and out of the usual course, for the benefit of the whole concern, and the other expences incurred, must be paid proportionably by the defendant as general average."—But the court held that the injury sustained by the ship, in this case, was not the proper subject of a general average, but only a particular average, for which the insured was entitled to recover.—Sir *James Mansfield* C. J. said,—"The case cited differs materially from this case; for there a cable was sacrificed for the benefit of the whole concern. This is only a common sea risk. If the weather had been better, or the ship stronger, nothing might have happened."

Covington v. *Roberts*, C. B. *Mich* 1808, MS. S.C. 2 New Rep. 378.

A ship being captured by a privateer, afterwards escapes by using a press of sail; but in doing so, she suffers material damage:—This was held not to be a general average, but a partial loss, for which the underwriters were liable.

With great deference, it might be observed on this case, that the injury sustained by the ship must have been, either the effect of sea damage, in the ordinary course of the voyage; and then, as she finally arrived at her port of destination, the underwriters would not have been liable for any loss:—Or, it must have been the effect of the effort to escape, and therefore a sacrifice for the general benefit of the whole concern; in which case, it was the proper subject of a general average, and then the underwriters would be liable only for the proportion of this which would fall on the ship.

Observations on this case.

As to the things on board which shall be liable to contribute to a general average, the rule seems to be,—that the ship, freight, and every thing remaining on board that

What things shall be liable to contribute to a general average.

that can properly be deemed a part of the cargo, shall be subject to this charge; and therefore money, plate, and even jewels, though their *weight* could not have increased the danger of the ship, must contribute according to their value (*a*); because the advantage derived from the sacrifice was not in proportion to the *weight*, but to the *value* of the things saved. But the persons on board, their wearing-apparel, the jewels or ornaments belonging to their persons, shall not contribute (*b*). Neither are seamen's wages liable to contribute (*c*); for if they were, seamen might sometimes be tempted to resist when a sacrifice is necessary for the general safety.

What not.

It is the captain's duty, on his arrival in port, to settle the contribution.

If the ship escape the dangers which made the sacrifice necessary, and arrive at her port of destination, the captain regularly should make his protests; and he, with some of the crew (*d*), must swear that the goods were thrown overboard, money paid, or other loss sustained, for the safety of the ship and goods, and for the preservation of the lives of those on board, and for no other cause (*e*). The average, if not settled before, should then be adjusted, and it should be paid before the cargo is landed, for the owners of the ship have a *lien* on the goods on board, not only for the freight, but also *to answer all averages and contributions* that may be due (*f*).

Remedy against the captain for neglecting to adjust the average, or to collect it.

Should this be neglected, the particular sufferer is not without remedy: For, as it is the duty of the captain to detain the goods on board till the contribution be made, an action would, I conceive, lie against him, or against the owners, for a neglect of that duty. If the loss were in money paid, an action on the case for money paid, would unquestionably lie against each person bound to contribute for his share; if in goods, a special action on the case, founded on the custom of trade, would lie

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(*a*) 1 *Mag.* 62, *Molloy* tit. Aver. § 4. Per *Buller*, J. in *Peters* v. *Milligan*, at N. P. after M. 1787.——(*b*) Vid. *Molloy*, l. 2, c. 6, ss. 14, *de leg. Rhod.* 2, art. 8. Laws of *Oler.* art. 8. and of *Wisb.* art. 20. As to freight, vid. 2 T. R. 407.——(*c*) 1 *Mag.* 71.——(*d*) Mal. lex merc. 113, says, *with most part of his company.*——(*e*) *Beawes* 148. *Molloy*, l. 2, c. 6, § 2. *Mal.* L. M. 113.——(*f*) *Mal.* L. M. 113.

against

against each person liable to contribute (*a*), or a bill in equity might be filed against them all.

The mode of ascertaining the amount of each person's contribution, is not very accurately defined in our law. —It is usually done, upon the ship's arrival at her port of discharge, by ascertaining the neat value of the ship, freight, and cargo, as if nothing had been lost, but all had arrived safe (*b*). These are to be valued at the price they would fetch in ready money at the port of discharge; and the neat amount, after deducting all charges, is the sum which is subject to the contribution (*c*). And each person's share of the loss will bear the same proportion to the value of his property, as the whole loss bears to the aggregate value of the ship, freight, and cargo.

How the contribution shall be settled.

Different foreign states have established a variety of positive regulations, as to the *degree* in which the ship shall be liable to contribute. Some, as in *England*, make the ship contribute for her full value and the freight (*d*); others, for half her value, and one third of the freight; others again, for half the value of ship and freight.

In what degree the ship shall be liable.

In *England* the ship contributes for her full value and freight.

In *England*, the ship is valued at the price she was worth on her arrival at her port of delivery; and almost all foreign states follow the same rule (*e*). The value of the freight is the clear sum which the ship has earned after seamen's wages, pilotage, and all such other petty charges as come under the denomination of *petty averages*, are deducted; of which the cargo bears two thirds, and the ship the remaining third.

The ship and freight are valued at what they are worth at the port of delivery.

As to the mode of valuing the jettison, the rule of the *Roman* law is, '*Portio autem pro estimatione rerum 'quæ salvæ suut, et earum quæ amissæ sunt, præstari solet. 'Nec ad rem pertinet, si hæ, que amissæ sunt, pluris veniri 'poterunt; queniam detrimenti, non lucri, sit præstatio. Sed*

How the jettison shall be valued.

(*a*) *Mo.* 297, *Show.* Ca Parl. 19, R. *Birkley* v. *Presgrave*, 1 *East* 220. sup. 542.——(*b*) It is necessary to take the goods lost into this account, otherwise the owner of them would be the only person who would not be a loser.——(*c*) Vid. 1 *Mag.* 69, *Molloy*, tit. Aver. § 15.——(*d*) *Konigsbergh*, *Hamburgh*, and *Copenhagen*. Vid. 2 *Mag.* 207, 237, 339.——(*e*) 2 *Mag.* ut sup.

 '*in*

'*in his rebus, quarum nomine conferendum est, æstimatio* '*debeat haberi, non quanti emptæ, sint, sed quanti venire* '*possunt* (*a*).' In *England* it was formerly the custom to value goods at *prime cost*, if the loss happened before half the voyage was performed; but if after, then at the price they would have borne at the port of delivery (*b*). But that distinction is exploded, and it is now the settled practice with us, to estimate the goods lost, as well as those saved, at the price they would have fetched at the port of delivery, on the ship's arrival there, freight, duties, and other charges, being deducted (*c*).

Under the general words of the policy, the insurer is bound to pay all average contributions.

If the sacrifice be made to avert any of the perils insured against, the contribution will be a loss within the policy. And it makes no difference whether the insured pay towards, or receive, the contribution. He must, in either case, bear his proportion of the general loss, and this ought to fall on the insurer. The doctrine of *Roccus* is, '*Jactu facto, ob maris tempestatem, pro sublevanda navi,* '*an teneantur assecuratores ad solvendum æstimationem rerum* '*jactarum domino ipsarum? Dic eos non teneri, quia pro rebus jactis sit contributio, inter omnes merces habentes in illa* '*navi pro solvendo pretio domino ipsarum, et ideo si assecuratus* '*recuperat pretium rerum jactarum, non potest agere contra* '*assecuratores; tamen tenentur assecuratores ad reficiendum* '*illam ratam et portionem, quam solvit assecuratus in illam* '*contributionem faciendo inter omnes, habentes merces in illa* '*navi, quæ portio cum non recuperetur ab aliis, habetur pro* '*deperdita, et proinde ad illam portionem tenentur assecuratores* (*d*).'

Where goods insured have been thrown overboard for the general benefit, it would seem that the owner of the goods ought, in the first instance, to claim the accustomed contribution, and resort to the underwriters only for the residue, which is in fact the true amount of his loss. If, however, this contribution should, from whatever cause, remain unpaid after the voyage is ended, *Pothier* holds that

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(*a*) *Dig.* lib. 14. tit. 2. *De lege Rhod.* *de jactu*, § 4.—— (*b*) *Mal. Lex Merc.* 113.——(*c*) *Molloy*, tit. Aver. § 15. Vid. 2 *Mag.* 100, 285, 339.——(*d*) *Roccus*, h. t. n. 62.

the underwriter will be liable for the whole value of the *jettiſon*; and they will have a right to ſue for contribution in the name of the inſured (*a*). I cannot approve of this practice, it permits an abandonment, in a caſe where there can only be a partial loſs.

Sect. VIII.

Of Loſs by Salvage.

AS the expence of ſalvage, like average contributions, is generally a charge for which the inſurer is liable, within the meaning of the policy, the ſubject of ſalvage muſt, like that of average, ſometimes incidentally occur in the conſideration of partial loſſes; and therefore it will be proper, under this head, to enquire in what caſes, and to what amount, ſalvage ſhall be a loſs within the policy.

Salvage originally meant the thing or goods ſaved from ſhipwreck or other loſs; and in that ſenſe it is generally to be underſtood in our old books. But it is at preſent more frequently underſtood to mean the compenſation made to thoſe by whoſe means the ſhip or goods have been ſaved from the effects of ſhipwreck, fire, pirates, enemies, or any other loſs or misfortune. This compenſation, which is now uſually made in money, was, before the uſe of money became general, made by a delivery of part of the effects ſaved. At common law, the party who has ſaved the goods of another from loſs or any imminent peril, has a *lien* on the goods, and may retain them in his poſſeſſion till payment of a reaſonable ſalvage, like that which a taylor, an innkeeper, or a common carrier, has upon the clothes, the horſes, or the goods of his cuſtomer (*b*.)

Salvage, what.

At common law the party has a *lien* on the things ſaved, till payment of ſalvage.

(*a*) Vid. *Pothier*, h. t. n. 52, 165.——(*b*) Per *Holt*, C. J. in *Hartford* v. *Jones*, 1 Lord *Ray*. 393; 2 *Salk*. 654; Vid. *Emerig*. tom. 2, p. 202, *Pothier*, h. t. n. 134.

How salvage is regulated.

Every maritime state has certain regulations to ascertain in what case, and to what amount, salvage shall be paid. To attempt to give an account of all such regulations, in foreign countries, would be more a work of curiosity than of utility.—It will be sufficient for our present purpose, to state shortly the regulations which the law of *England* has established on this subject, and which will be principally found in our statutes; some of which are of very ancient date (*a*). But the regulations upon this subject which are now principally in force, are found in the stat. 12 An. stat. 2. c. 18. and subsequent acts, made for the protection of ships and goods stranded on the coasts of this kingdom.

By 12 *An.* stat. 2, c. 18, § 2, Persons employed in the salvage of ships, &c. shall within 30 days be paid a reasonable reward.

That statute, after directing the means to be employed for the preservation of ships in distress, enacts, (§ 2.) 'That, all persons who shall be employed in preserving 'ships or vessels in distress, or their cargoes, shall, 'within 30 days after the service performed, be paid a '*reasonable reward* for the same, by the commander or 'other superior officer, mariners, or owners of the ship 'or goods so saved; and in default thereof, the ship, 'vessel, or goods so saved shall remain in custody of the 'collector of the customs or his deputy, until all charges 'shall be paid, and until all persons so employed shall 'be reasonably gratified for their trouble; or good security given, to the satisfaction of the several parties that 'are to receive the same. And in case the commander 'or other superior officer, mariners, or owners, of the 'ship or goods so saved, shall disagree with the said 'officer of the customs (*b*), touching the money deserved 'by the persons so employed, the commander of the

How secured to them.

If the parties disagree about the *quantum*, three neighbouring justices shall adjust it.

(*a*) 3 *Ed.* I. c. 4; 4 *Ed.* I. c. 2; 27 *Ed.* III. c. 13.—

(*b*) Where the salvage is made by a person employed by the master of the vessel in distress, though under the inspection of the officers of the customs, the person so employed shall be considered as the agent of the owners; and a disagreement between him and the owners, as to the quantum of his charges, cannot be adjusted by three magistrates, that not being a case within this act. R. *Baring* v. *Day*, 3 *East* 57.

'ship

'ſhip ſaved, or the owner of the goods therein, and the 'ſaid officer of the cuſtoms may nominate three neigh- 'bouring juſtices, who ſhall adjuſt the *quantum* of the 'gratuity to be paid to the ſeveral perſons acting in the 'ſalvage of the ſhip or goods; and ſuch adjuſtment 'ſhall be binding to all parties, and ſhall be recoverable 'in an action at law to be brought by the reſpective 'perſons to whom the ſame ſhall be allotted by the juſ- 'tices. And in caſe no perſon ſhall appear to make his 'claim to all or any of the goods ſaved, then the chief 'officer of the cuſtoms of the neareſt port, ſhall apply 'to three of the neareſt juſtices, who ſhall put him or 'ſome reſponſible perſon in poſſeſſion of ſuch goods, 'ſuch juſtices taking an account thereof in writing, to 'be ſigned by ſuch officers of the cuſtoms; and if the 'goods ſhall not be legally claimed within 12 months, by 'the right owners, they ſhall be publicly ſold, or, if pe- 'riſhable, forthwith ſold, and the produce of the ſale, 'after all charges deducted, with a fair account of the 'whole, ſhall be tranſmitted to the *Exchequer*, there to 'remain for the benefit of the owner, when appearing; 'who, upon affidavit, or other proof of his right, to 'the ſatisfaction of one of the barons of the coif, ſhall, 'upon his order, receive the ſame out of the *Exchequer*.'

How the goods ſaved ſhall be diſpoſed of, if no owner appears.

This ſtatute alſo preſcribes the puniſhment to be in- flicted on perſons guilty of plundering or deſtroying ſhips in diſtreſs. But this being found inſufficient to repreſs theſe barbarous practices, the ſtat. 26 *G.* II., c. 19, has enacted a variety of further regulations for the more effec- tual puniſhment of offenders and the better protection of ſhips in diſtreſs.

On the ſubject of ſalvage, the 5th ſection of this act provides, 'That in caſe any perſon, not employed in the 'ſalvage of the ſhip or goods, ſhall, in the abſence of 'the perſons ſo employed and authorized, ſave any ſuch 'ſhip or goods, and cauſe the ſame to be carried, for 'the benefit of the owners, into port, or to any near ad- 'joining cuſtom-houſe, or other place of ſafe cuſtody, 'immediately giving notice thereof to ſome magiſtrate 'or cuſtom-houſe or exciſe-officer; or ſhall diſcover to

By 26 *G.* II. c. 19, § 5. Perſons, though not *employed*, who ſhall ſave any ſhip or goods, or give notice of any goods unlawfully bought, ſold, or concealed, ſhall be entitled to ſalvage.

'such magistrate or officer where such goods are wrong-'fully bought, sold, or concealed, then such person shall 'be entitled to a reasonable reward for such services; 'to be paid by the master or owners of such vessels or 'goods; and to be adjusted in case of disagreement 'about the *quantum*, in like manner as the salvage is to 'be adjusted and paid by virtue of the stat. 12 *Ann.*'

By § 6. The nearest magistrate, collector of the customs, or chief constable shall call a meeting of the sheriff, magistrates, &c. five of whom may employ persons for saving ships, &c.

And by § 6, 'For the better ascertaining the salvage 'to be paid in pursuance of this and the former act, 'the justice, mayor, bailiff, collector of the customs, or 'chief constable, who shall be nearest to the place where 'the ship or goods shall be stranded, shall forthwith give 'public notice for a meeting, to be held as soon as pos-'sible, of the sheriff, or his deputy, the justices, mayors, 'or other chief magistrates of towns, coroners, or com-'missioners of the land tax, or any five or more of 'them, who are required to give aid in the execution 'of this and the former act, and to employ proper 'persons for the saving of ships in distress, and such 'ships and effects as shall be stranded or cast away; 'and also to examine persons on oath touching the same, 'or the salvage thereof, and to adjust the *quantum* of 'such salvage, and distribute the same among the per-'sons concerned in such salvage, in case of disagree-'ment among the parties, or the said persons; and that 'every such magistrate, &c. attending and acting at such 'meeting, shall be paid four shillings a-day for his ex-'pences, out of the goods saved by their care or direc-'tion.—Provided (§ 7.) that if the charges and rewards 'for salvage, directed to be paid by this and the former 'act, shall not be fully paid, or sufficient security given 'for the same within 40 days after the services per-'formed, the officer of the customs concerned in such 'salvage shall borrow or raise so much money as shall 'be sufficient to pay such charges, or any part thereof 'remaining unpaid, or not secured as aforesaid, by or 'upon one or more bill or bills of sale under his hand 'and seal, of the ship or vessel, or cargo saved, or such 'part thereof as shall be sufficient, redeemable on pay-'ment of the principal sum borrowed, and interest at '4 *per cent. per annum.*'

And examine persons on oath, &c. to adjust the *quantum* of salvage.

Such magistrate, &c. to have 4s. a-day.

By § 7, if the salvage be not paid, or security given within 40 days, the officer of the customs shall raise money by bill of sale of the ship or goods saved, redeemable on payment of principal and 4 *per cent.* interest.

There

There are many other regulations in this act, as to the persons by whom this and the former act shall be put in force, and as to the detection and punishment of offenders. The foregoing extracts which have been made for the purpose of shewing that, by our law, the salvage of ships or goods stranded or cast away, is a reasonable satisfaction to the persons employed in saving and protecting them, for their labour; to be estimated, not according to their own arbitrary will, but by persons of the first respectability in and near the place where the misfortune happens.

How salvage upon a *recapture* was regulated by the marine law.

With respect to salvage in the case of recapture, by the marine law of *England*, as practised by our courts of admiralty, previous to any parliamentary regulations, if the ship or goods were retaken before condemnation, till which time the *jus postliminii* continued, the original owner was entitled to have restitution decreed to him, on payment of a *reasonable salvage* to the recaptors. But by several statutes (*a*), salvage upon a recapture was fixed at certain rates, according to the length of time the recaptured ship was in the hands of the enemy. It will be sufficient, however, for our present purpose, to state the regulations now in force as they were established by the last prize act.

By 43 G. III. c. 160, ships, &c. *at any time* recaptured, shall pay, if retaken by men of war, one *eighth*, if by privateers, one *sixth*, for salvage.

By stat. 43 *G.* III. c. 160. § 39. 'If any ship or vessel, 'taken as prize (*b*), or any goods therein, shall appear, in 'the court of admiralty, to have belonged to any of his 'Majesty's subjects, which were before taken by any of his 'Majesty's enemies, and at any time afterwards retaken 'by any of his Majesty's ships, or any privateer, or other 'ship or vessel under his Majesty's protection; such ships, 'vessels, and goods shall, in all cases, (save as hereafter 'excepted), be adjudged to be restored, and shall be ac-

(*a*) Vid. 13 *G.* II. c. 4. and 29 *G.* II. c. 34.—(*b*) The right of restitution under this act is confined to cases of capture during actual hostilities; and cannot be extended to the case of a vessel confiscated in time of peace for an alledged violation of the revenue laws of *France*. Case of the *Jeune Voyageur*, 5 *Rob.* Adm. Rep. 1.

'cordingly restored, to such former owner or owners, he 'or they paying for salvage, if retaken by any of *his 'Majesty's ships, one eighth* part of the true value thereof, 'to the flag officers, captains, &c. to be divided as the 'same act directs: And if retaken by any *privateer*, or 'other ship or vessel, *one sixth* part of the true value of 'such ships and goods, to be paid to the owners, officers, 'and seamen of such privateer or other vessel, without 'any deduction. And if retaken by the joint operation 'of one or more of his Majesty's ships, and one or more 'private ships of war, the judge of the court of admi-'ralty, or other court having cognizance thereof, shall 'order such salvage, and in such proportions, to be paid 'to the captors, by the owners, as he shall, under the 'circumstances of the case deem fit and reasonable. But 'if such recaptured ship or vessel shall appear to have 'been set forth, by the enemy, as a ship or vessel of war, 'the said ship or vessel shall not be restored to the former 'owners; but shall, in all cases, whether retaken by any 'of his Majesty's ships, or by any privateer, be adjudged 'lawful prize for the benefit of the captors.'

If retaken by both jointly, the judge of the admiralty shall order such salvage, and in such proportions, as he shall deem fit.

But if the recaptured ship be set forth by the enemy as a *ship of war*, she shall be lawful prize to the recaptors.

As the insurer does not, in express words, undertake to pay salvage, perhaps the insured could not declare for a loss *by the payment of salvage*. That form of declaring might, perhaps, be thought too general. Indeed it would be useless to declare so, for he may declare as for that species of loss which occasioned the payment of salvage, and recover the salvage actually paid (*a*). And upon the same declaration he may recover for the loss, if any, sustained by damage done to the goods saved.

The insured need not *declare* for salvage, but may recover under a declaration for the loss which occasioned it, and for the damage the goods saved have sustained.

It is usual, in cases of capture and recapture, to declare upon a total loss by capture, and upon this the plaintiff may recover the amount of the salvage and expences.

These regulations relate only to the salvage of *British* ships recaptured. In the case of *neutral* ships captured by the enemy, and retaken by *British* men of war or privateers, the courts of admiralty have a discretionary

The court of admiralty regulates the rate of salvage in the case of recaptured *neutrals*.

(*a*) R. *Cary* v *King*, Ca. Temp. *Hard*. 304. Vid. inf. ch. 16, § 2.

 power

power of allowing ſuch ſalvage, and in ſuch proportions, as, under the circumſtances of each particular caſe, may appear juſt. But there is no poſitive law or binding regulation, to which parties may appeal for aſcertaining the rate of ſuch ſalvage.—Sir *William Scott* holds (*a*), that no ſalvage is due upon recapture of neutral property out of the hands of the enemy, unleſs it appear from the ordinances, or the practice of the prize-courts of the enemy, that the firſt ſeizure was made under ſuch circumſtances as would have expoſed the goods to condemnation in the hands of the enemy.

In the caſe of recaptured *allies.*

As to *allies*, our courts of admiralty hold that the maritime law of *England* having adopted a moſt liberal rule of reſtitution on ſalvage, with reſpect to the recaptured property of its own ſubjects, gives the benefit of that rule to its allies, till it appear that they act towards *Britiſh* property on a leſs liberal principle: In ſuch caſe it adopts their rule, and treats them according to their own meaſure of juſtice (*b*).

Salvage upon recapture muſt be paid under an adjudication of a court of admiralty, to entitle the inſured to claim it from the underwriters.

Before an action will lie for a loſs by payment of ſalvage upon a recapture, the amount of ſuch ſalvage muſt have been aſcertained by the deciſion of a court of admiralty, which alone has juriſdiction to determine as to the *right* to ſalvage in every ſuch caſe; and, in the caſe of the recapture of neutrals, as to the *amount* of ſuch ſalvage.

When the ſalvage, however, is very high, which may happen in the caſe of ſhipwreck, the inſured may abandon, and call upon the inſurer as for a total loſs, as we ſhall have occaſion more particularly to obſerve hereafter, in the chapter upon abandonment.

(*a*) In the caſe of the *Carlotta*, 5 *Rob.* Adm. Rep. 54.——(*b*) So laid down by Sir *William Scott*, in the caſe of the *Santa Cruz*, 1 *Rob.* Adm. Rep. 63, in which caſe this ſubject will be found conſidered much at large, and in his very luminous manner.

Sect. IX.

Of Loss by the Death of Slaves.

AS the act for the abolition of the *African* slave trade, only prohibits and declares unlawful insurances upon the trade *so abolished* (*a*), insurances upon a trading in *African* slaves, by the subjects of any foreign state, may still, I conceive, be legally made in this country. For this reason, and because questions may yet arise on policies which were effected in this country before the abolition of this trade, it will be proper here to shew what shall be deemed a loss by the death of slaves.

Whether natural death would now be a legal risk.

Though we have now no statute in force for the *regulation* of the slave trade, it is very improbable that in a case of *foreign* slave trade, our courts would be disposed to tolerate an insurance against the mortality of the slaves by natural death or ill treatment. It may therefore be proper here to shew in what cases the death of slaves shall be deemed a loss within a policy on slaves.

Whether a loss by slaves thrown overboard in a scarcity of water could be insured against.

If the master of a slave ship mistake his course, whereby a scarcity of water ensues, and a number of the slaves are thrown overboard for the preservation of the ship's crew and the rest of the slaves, this has been holden not to be a loss *by the perils of the sea* (*b*): Nor would it be a loss of any description within the common policy; and no words, I conceive, could be legally inserted in a policy to meet such a case.

If from the length of the voyage there be a scarcity of provisions, and some of the slaves die for want of food, this is natural death.

So where a slave ship, on her passage to the *West Indies*, was so retarded by bad weather and other unavoidable accidents, that from the extraordinary length of the voyage, the provisions for the slaves were exhausted, and many of them died from the want of proper food: In this case, though the failure of the provisions was occasioned by the perils of the sea, and the death of the slaves

(*a*) Vid. stat. 47 *G.* III. c 36, § 1, 5.——(*b*) R. *Gregson* v. *Gilbert*, B. R. 23 *G.* III. *Park.* 62. inf. ch. 16, § 2.

was

was the neceſſary conſequence of this; the loſs muſt be aſcribed to natural death (*a*).

What ſhall be mortality by mutiny.

If, in a policy on ſlaves, mortality by *mutiny* be included in the perils inſured againſt; and, in a mutiny, ſome are killed, others die of their wounds received in the mutiny, others of chagrin, others by ſwallowing ſalt water, others jump overboard and are drowned: The underwriters are liable for thoſe who are killed, or mortally wounded, in the mutiny; but not for thoſe who died from the other cauſes (*b*).

Sect. X.

Of Loſs by the Death of Animals.

Valin, and, after him, *Pothier*, claſs animals and negro ſlaves under the ſame head, and apply the ſame rules to both (*c*).—According to theſe learned writers, if animals, ſuch as horſes and other cattle, or beaſts or birds of curioſity, be inſured in their paſſage by ſea; their death occaſioned by tempeſts, by the ſhot of an enemy, by jettiſon in a ſtorm, or by any other extraordinary accident occaſioned by any of the perils enumerated in the policy, is a loſs for which the underwriters are liable. Not ſo, if it be occaſioned by mere diſeaſe or natural death (*d*).

(*a*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656.——(*b*) R. *Jones* v. *Schmoll*, 1 T. R. 130. n.——(*c*) Vid. *Valin* h. t. art. 11, 15, *Pothier* h. t. n. 66.——(*d*) *Valin* h. t. art. 29, p. 70, *Pothier* h. t. n. 66. *Emerig*, tom. 1. p. 393.

Sect. XI.

Of fraudulent Losses.

AT the conclusion of the sixth section of the present chapter (*a*) we shortly adverted to the punishment of barratry by the laws of other countries. We will, in the present section, shew how piracy and other offences of this nature, and also the offence of procuring wilful and fraudulent losses, with intent to defraud insurers, are punishable by the law of *England*.

How piracy is punished by the law of *England*.

The crime of piracy, or robbery upon the high seas, is an offence against the universal law of society; a pirate being, as Lord *Coke* describes him, *hostis humani generis*. By the ancient common law, piracy, if committed by a *subject*, was held to be a species of treason, being contrary to his natural allegiance; and by an *alien*, to be felony only: But now, since the statute of treasons, 25 *Ed.* III. c. 2. it is holden to be only felony in a subject (*b*). Formerly this offence was only cognizable by the admiralty courts, which proceed by the rules of the civil law (*c*). But it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, the stat. 28 *H.* VIII, c. 15, established a new jurisdiction for this purpose, which proceeds according to the course of the common law (*d*).

The offence of piracy by the common law, consists in the committing of those acts of robbery and depredation upon the high seas, which, if committed upon land, would amount to felony there (*e*). But by stat. 11 and 12 *W.* III, c. 7, § 8 and 9. ' If any natural ' born subject commit any act of hostility upon the high

(*a*) Sup. 534.——(*b*) 3 Inst. 113.——(*c*) 1 *Hawk.* P. C. 98.——(*d*) Vid. 4. *Bl.* Com. 71.——(*e*) 1 *Haw.* P. C. 100.

' seas,

'seas, against others of his Majesty's subjects, under 'colour of a commission from any foreign power; 'or if any commander or mariner shall betray his trust, 'and run away with any ship, boat, ordnance ammu-'nition or goods; or yield them up voluntarily to any 'pirate; or bring any seducing message from any pi-'rate, enemy, or rebel; or consult, combine, or con-'federate with, or attempt to corrupt, any officer or 'mariners to yield up, or run away with, any ship or 'goods, or turn pirate; or shall lay violent hands on 'his commander, to hinder him from fighting in de-'fence of his ship; or shall confine him, or make, or 'endeavour to make, any revolt in the ship, shall be 'adjudged to be a pirate, felon, and robber, and shall 'suffer death and loss of lands, as a pirate, felon and 'robber on the sea ought to suffer, whether he be 'principal, or merely accessary by setting forth such 'pirates, or abetting them before the fact, or receiving 'or concealing them or their goods, after it:' And the stat. 4 *G.* I. c. 11. expressly excludes the principals from the benefit of clergy. By the stat. 8 *G.* I. c. 24, trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose; or confederating or corresponding with them, or forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy; and such accessaries to piracy as are described in the above stat. 11 and 12 *W.* III. are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. Thus does the statute law of *England* aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon offences against that universal law.

The stat. 1 *An.* st. 2, c. 9, § 4 and 5, makes it a simple felony in any master or mariner, wilfully to cast away, burn, or destroy any ship to which he belongs, to the prejudice of the *owner*, or of any *merchant who shall load goods thereon*; and takes away the benefit

The 1 *An.* st. 2, c. 9, makes it felony to destroy any ship, to the prejudice of the owners of the ship or goods on board; and takes away clergy, if committed at sea.

nefit of clergy from such offences, *committed on the high seas.*

The 4 G.I. c. 12, extends this to the case of the owner or master who shall destroy any ship to the prejudice of the owners of, or underwriters upon, goods.

Though the insurers are only answerable for losses arising from the *accidents and misfortunes* incident to maritime adventures, and not for such as proceed from contrivance or design on the part of the insured; yet the temptation to defraud insurers by the wilful and concerted destruction of ships and goods insured, in order to give a colour to fraudulent claims for pretended losses, has been found productive of so many evils, that it became necessary for the legislature to interpose its authority to restrain them: And therefore, by stat. 4 *G.* I. c. 12, § 3, 'If any owner, captain, master, mariner, or other officer of any ship, shall willfully cast away, burn, or otherwise destroy the ship, of which he is owner, or to which he belongs; or in any manner direct or procure the same to be done, to the prejudice of the person or persons that shall underwrite any policy of insurance thereon; or of any merchant that shall load goods thereon, shall suffer death.'

The 11 G. I. c. 29, takes away clergy from such offences in all cases.

This statute having only made this crime a simple felony, it was found insufficient to restrain the commission of it, and therefore the stat. 11 *G.* I. c. 29, § 6 and 7, takes away from it the benefit of clergy, and inflicts the same punishment on persons guilty of the like offences, '*with intent to prejudice any owner of such ship*:' And it further enacts, that if such offences be committed within the body of any county, they shall be tried in the same manner as other felonies; if on the high seas, then according to the directions of the stat. 28 *H.* 8. c. 15.

CHAP. XIII.

Of Abandonment.

Preliminary Obſervations.

Nature of abandonment.

IT has already been obſerved (*a*) that the term *total loſs* does not only ſignify the abſolute deſtruction of the thing inſured, according to its natural import; but alſo that, in legal and commercial language, it means ſuch a loſs or damage to the thing inſured, though it ſpecifically remain, as renders it of little or no value to the owner. It alſo means any loſs or misfortune whereby the voyage is loſt, or not worth purſuing, and the projected adventure fruſtrated. In ſuch caſes the inſured is entitled to call upon the inſurer as for a total loſs: But then he muſt *abandon*; that is, he muſt renounce and yield up to the inſurer all his right, title and claim, to what may be ſaved, and leave it to him to make the moſt of it for his own benefit. The inſurer then ſtands in the place of the inſured, and becomes legally entitled to all that can be reſcued from deſtruction (*b*). The idea of abandonment therefore, pre-ſuppoſes a total loſs in this latter ſenſe, and implies that ſomething remains which may be ſaved, and which may be given up, or abandoned, to the inſurers. For if the inſured could only abandon, in the caſe of a total loſs, in the ſtrict and natural ſenſe of the words, there would be nothing to abandon, and abandonment could then be only an uſeleſs form.

Whether coeval with inſurance itſelf.

It has been ſaid that the practice of abandoning dates its origin from the period when the contract of inſurance itſelf firſt came into uſe (*c*); and yet it does not ſeem to be a right which neceſſarily reſults from the nature

(*a*) Sup. 485.—— (*b*) Vid. *Pothier*, h. t. n. 133. Ord. of *Louis* XIV, h. t. art. 47. Ord. *Bilboa*, art. 32. 1 *Vez*. 98. ——(*c*) *Park* 143.

of

of the contract.—That the loss or damage should be made good by the insurer, who has made himself responsible, is perfectly reasonable, and conformable to the spirit of the contract. But it does not necessarily follow from thence, that, in case of a disaster, he should be *forced* to become the proprietor of the ship or goods insured, merely because he was a surety for their safe arrival: indeed the author of *Le Guidon* (*a*) says, that abandonment is only to be resorted to in extreme cases.

Its probable origin

It seems more probable that abandonment arose from the practice of occasionally introducing into policies particular stipulations, that if the thing insured should be spoiled or greatly damaged by any of the perils insured against, it should be abandoned to the insurers, who should be thereupon obliged to pay the entire sum insured; and that simply making good the damage should not be sufficient to discharge them; and stipulations like this, being frequently introduced into the contract, became at length the foundation of general rules, which have been established by positive law in some countries, and adopted in others as part of the general law of insurance.

Whether carried too far.

Be this as it may, it has been thought that, in many instances, the practice of abandoning has been carried too far; and that the insured should, in no case, be permitted to abandon, where the effects insured, or the greatest part of them, still exist, and are in the power of the insured. Mr. Justice *Buller* seems to have been of opinion, that when this question first came before our courts, it would have been the wisest policy to have determined that the owners should in no case be allowed to abandon, where the property still existed (*b*). The first case we find in our books on the right of abandonment, came before Lord *Hardwicke* in the court of Chancery in the year 1744; and he, after some deliberation, determined that where a recaptured ship and cargo were sold to pay the salvage, the insured had a right to abandon the surplus, and claim as for a total loss (*c*).

(*a*) c. 7, art. 2.—(*b*) Vid. 1 T. R. 615, 616.—(*c*) Vid. *Pringle* v. *Hartley*, 3 *Atk*. 195, inf.

It

It must be admitted that the privilege of abandoning, in every case that is deemed a total loss, may sometimes be liable to great abuse. For instance, where, as in the case of capture, the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer who will have the benefit of a recapture, or of any other accident, by which the thing may be recovered. But it seems, at first sight, impolitic, not to say unreasonable, that the owner of a ship which is stranded, (the captain and crew being his servants, on the spot, and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters, who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands, but to the greatest disadvantage.

On the other hand it may be truly said that the captain must occasionally be the agent, not only of the owners or freighters of the ship, but also of every person interested either in the ship or cargo; that he, in case of misfortune, is bound to do the best in his power for the benefit of all concerned; and that, whether he dispose of what is saved for account of the insured, or of the insurer, comes to the same thing, since in both cases the amount must go in diminution of a total loss. Still it must occur to every person who has any experience in subjects of this nature, that it were much better that the master, in case of misfortune, should continue the agent accountable to the owners who know him, and who know the extent of his charge, than to the underwriters who know neither.

Having premised thus much of the general nature of abandonment, we will now proceed to consider,

I. *In what cases the insured may abandon*;
II. *Within what time he may abandon*;
III. *The form of the abandonment*;
IV. *The effect of it*;
V. *Of the ordering and disposal of the effects abandoned.*

Sect. I.

In what cases the insured may abandon.

The general principle upon which the right of abandoning rests.

IN general it may be laid down that, by the law of insurance, as understood in *England*, the insured may abandon in every case where, by the happening of any of the misfortunes or perils insured against, the voyage is lost, or not worth pursuing, and the projected adventure is frustrated; or where the thing insured is so damaged and spoiled as to be of little or no value to the owner; or where the salvage is very high; or where what is saved is of less value than the freight; or where further expence is necessary, and the insurer will not undertake, at all events, to pay that expence, &c. (*a*).

In what case it is permitted in *France*.

The ordinance of the marine of *Louis* XIV. (*b*) which in this, as in most other particulars, is collected from the same ancient sources from whence other countries have drawn their principles of the law of insurance, confines abandonment to these five cases; capture, shipwreck, stranding, arrest of princes, or the *entire loss of the effects insured* (*c*).

Valin thinks the latter words mean, not an absolute destruction, but a *general loss* (*d*).—*Pothier* says, they mean a total, or *almost* total, loss (*e*). This he explains by saying, that goods which are considerably damaged are deemed to be goods lost; and therefore when all, or almost all, the goods are in that state, it is a total loss. Both these authors cite *Le Guidon*, where it is laid down that the insured may abandon when there is an average loss or damage which exceeds half the value of the goods insured,

(*a*) Per Lord *Mansfield*, in *Milles* v. *Fletcher*, inf. —(*b*) h. t. art. 46. —(*c*) "*Perte entiere des effets assurés*"—(*d*) "*Perte generique des effets assurés, sans être absolue.*" *Valin* on art. 19, h. t. p. 61.—(*e*) "*Perte totale ou presque totale des effets assurés.*" *Pothier*, h. t. n. 119.

or in caſe they be ſo damaged as not to be worth the freight or little more (*a*).

Emerigon objects to both theſe interpretations as being vague and uncertain, and as leaving it too much in the breaſt of the judge to decide what ſhall be an *entire*, or *almoſt* entire, loſs, which, he ſays, muſt lead to great doubts and ruinous litigation (*b*).

By the *French* law, the right to abandon ſeems to depend on the *ſpecies of misfortune* which has happened; with us it depends rather on the *degree of loſs* ſuſtained in conſequence of it.

Such are the general principles upon which the right of abandoning reſts: We will now take a view of the caſes in which thoſe principles have been exemplified, 1ſt, *Upon loſſes by capture, and arreſt of princes*; *and*, 2dly, *upon other loſſes*.

1. *Of the right of abandoning, upon Capture, and arreſt of Princes.*

As capture and arreſt of princes have afforded the moſt frequent occaſions for abandonment, ſo moſt of the great leading principles upon which the right of abandoning reſts, have been diſcuſſed and eſtabliſhed in caſes of that ſort.

Capture or arreſt of princes is, *primâ facie* a total loſs, for which the inſured may abandon.

Capture by an enemy or a pirate, or an arreſt of princes, or even an embargo, is *primâ facie* a total loſs; and immediately upon the capture, or upon a mere arreſt, or at any time while the ſhip continues under detention, the inſured may elect to abandon, and give notice to the inſurer of his intention to do ſo, and thus entitle himſelf

(*a*) "*Le marchand chargeur eſt en liberté de faire à ſes aſſureurs de la propriété qu'il a en la marchandiſe chargée, lors et quand il advient avarie qui excéde ou endommage la moitié de la marchandiſe, ou telle empirance en la marchandiſe qu'elle ne value le frêt, ou peu de choſe d'avantage.*" *Le Guidon*, ch. 7, art. 1.—— (*b*) *Emerig.* tom. 2, p. 183.

to claim as for a total loss from the insurer. For, from the moment of the capture, or arrest, the owners lose their power over the ship and cargo, and are deprived of the free disposal of them; and, in the opinion of the merchant, his right of disposal being suspended or rendered uncertain, is equivalent to a total deprivation. It would therefore be unreasonable to oblige the insured to wait the event of capture, detention, or embargo (*a*).

And he is not bound to litigate the validity of the capture.

And immediately, upon receiving intelligence of a capture, he may abandon; nor is he bound to make any claim or appeal to the enemy's courts of admiralty, or to litigate there the validity of the capture; but may wholly leave that to the underwriters (*b*).

But he is not bound to abandon upon a capture.

But the insured is, in no case, *bound* to abandon; and, as the law now stands, no capture of the enemy can be so total a loss as to leave no possibility of recovery, for the *jus postliminii* continues for ever, except in the case of a captured ship being turned into a ship of war. If the owner himself should retake the ship or goods, he will be fully entitled to them; and if they be retaken at any time by another, whether before or after condemnation, he will be entitled to restitution, upon payment of a settled salvage (*c*).—The chance of the owner's recovering his property does not, however, suspend his right to demand as for a total loss: But, in the case of a recapture, justice is considered to be done to the insurer by putting him in the place of the insured. A policy of insurance, as a contract of *indemnity*, is always liberally construed (*d*).

Upon a wager policy the insured cannot abandon.

There is this difference between a policy *upon interest*, and a *wager policy*, that, in the one case the insured may, if he think proper, abandon the moment he has notice of a capture or detention, and this will bind the underwriters, whatever may be the ultimate fate of the ship; but in the

(*a*) Vid. Lord *Mansfield*'s judgment in *Goss* v. *Withers*, 2 *Bur*. 696. inf. 567.——(*b*) Vid. 2 *Bur*. 696; Adm. in *Tyson* v. *Gurney*, 3 T. R. 479.——(*c*) Vid. stat. 43 G. III. ch. 160, sup. 551.——(*d*) See Lord *Mansfield*'s judgment in *Goss* v. *Withers*, 2 *Bur*. 696, 7.

case

case of a wager policy, there can be no abandonment, because the insured has nothing to abandon (*a*).

But a capture or arrest does not necessarily, and at all events, terminate in a total loss, so as to entitle the insured to abandon at any time; for, as he cannot abandon till he has received advice of the loss, if, at the time he receives such advice, or before he has elected to abandon, he receive advice that the ship or goods insured are recovered, or are in safety, he cannot then abandon; because he can only abandon *while* it is a total loss, and he knows it to be so, not after he knows of the recovery. Therefore, if a captured ship be retaken and permitted to proceed on her voyage, so that she suffer but a small temporary inconvenience; this is only a partial, and not a total, loss (*b*).

But a capture or arrest does not *necessarily* terminate in a total loss.

On the other hand, a title to restitution, upon a recapture, does not necessarily, and at all events, deprive the insured of the right to abandon: For if, in consequence of the capture, the voyage be lost, or not worth pursuing; if the salvage be very high; if farther expence be necessary, and the insurer will not undertake at all events to pay it, the insured may abandon.—The rule is, that, if the thing insured be recovered before any loss is paid, the insured is entitled to claim as for a total, or a partial loss, according to the final event; that is, according to the state of the case at the time he makes his claim. There is no vested right to a total loss, till the insured, having a right to abandon, elects to do so; for he is only

Neither does a recapture necessarily deprive the insured of the right to abandon.

If the thing insured be recovered before the loss is paid, the loss will be total or partial, according to the final event.

(*a*) Vid. Lord *Mansfield's* judgment in *Kulen Kemp* v *Vigne*, 1 T. R. 304, sup. 130.——(*b*) By the law of *France*, the ship being once captured, it is always a total loss; and the legal effect of it is presumed to continue, though the ship be released or retaken. The recovery of the goods insured is only for the account of the insurer, who cannot, under pretence that they are arrived at their port of destination, refuse the abandonment. The recovery of the goods is merely in nature of salvage. *Emerig.* tom. 2, p. 188.

entitled to an indemnity for his loſs as it ſtands at the time of the action brought, or offer to abandon.

But if, after a loſs has been paid, the thing inſured be recovered, the inſured ſhall not be obliged to refund

But if, after a total loſs has been actually paid, the thing inſured be recovered, the inſurer cannot oblige the inſured to refund the money he has received; but he ſhall ſtand in the place of the inſured, and ſo no injuſtice is done.

Though there be a recapture, yet, if the voyage be loſt, the inſured may abandon.

The two following caſes are cited as examples to ſhew that though a captured ſhip be recaptured, yet if the voyage be loſt, the loſs will be total, and the inſured will have a right to abandon.

Pringle v. *Hartley*, in Chan. 1744, 3 *Atk.* 195.

A ſhip is taken, and retaken, and ſold in a diſtant country to pay the ſalvage, and the reſidue of the proceeds remains in the court of admiralty there:—The inſured may abandon, and recover as for a total loſs.

The firſt was the caſe of a ſhip inſured from *London* to *Bermudas* and *Carolina*, taken by a *Spaniſh* privateer, retaken by an *Engliſh* privateer, and carried into *Boſton*, in *America*, where no perſon appearing to give ſecurity, or anſwer for the ſalvage, ſhe was condemned and ſold in the court of admiralty there. The recaptors had their moiety of the proceeds, and the ſurplus remained in the hands of the officers of the court.—An action at law was brought upon the policy by the inſured, who obtained a verdict againſt the underwriter for a total loſs. The underwiter filed a bill in Chancery, and moved for an injunction to ſtay the proceedings at law, inſiſting that the inſured ought not to recover more than the ſalvage, which, in this caſe, was a moiety, as the ſtat. 13 *G.* II. c. 4, § 18, gave the thing ſaved, ſubject to ſalvage, to the owner, who was entitled to receive it from the officers of the admiralty court at *Boſton*. The inſured, in his anſwer, ſwore that he had *offered*, and was then willing, to *relinquiſh* his intereſt to the inſurers in the benefit of the ſalvage, and would give them a letter of attorney to receive it.—Lord Chancellor *Hardwicke* determined that there was no ground for an injunction in this caſe.—He ſaid:—"At the time of the trial, the inſured knew that the ſhip was retaken.—The queſtion ariſes on the ſtat. 13 *G.* II. with regard to the ſalvage. It has been ſaid that there ought to be only half the loſs recovered on the policy; and, as to that, the act has made great alteration in the law of nations, with reſpect

to

to recaptures. The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the recaptor, as if it had been originally the ſhip of the enemy; but, by the act, the recapture reveſts the property in the owner. If there had been a ſalvage, it muſt have been deducted out of the money recovered under the policy; but if none came to the hands of the inſured, the jury could not take notice of it. It is uncertain whether the inſured will receive any thing or not: And if any thing be recovered, he muſt have an allowance for his expences in recovering it. Therefore, being willing to *relinquiſh his intereſt* in the ſalvage, he ought to have recovered *the whole money inſured*. It would be miſchievous if it were otherwiſe; for then, upon a recapture, the inſured would be in a worſe ſituation than if the ſhip were totally loſt."

Goſs v. *Withers*, 2 *Bur.* 683.

A ſhip, after throwing part of her cargo overboard in a ſtorm, and being diſabled from proceeding on her voyage till refitted, is captured and her crew taken out; but after being eight days in poſſeſſion of the enemy, is recaptured and carried into an *Engliſh* port, upon which the inſured give notice to abandon. Before the ſhip can be refitted, the reſt of the cargo is ſpoiled:—This is a total loſs, and the inſured may abandon.

In the ſecond caſe, two inſurances were made, the one on the ſhip *David* and *Rebecca*, the other on goods on board, 'At and from *Newfoundland* to her port of diſ'charge in *Portugal* or *Spain*, without the *Streights*, or '*England*.'—In an action upon the former policy, the plaintiff declared upon a total loſs by capture; upon the latter, the declaration alledged that divers quantities of fiſh and other merchandizes, were put on board; and averred that one fourth of the ſaid goods were neceſſarily thrown overboard in a ſtorm, to preſerve the ſhip and the reſt of the cargo; after which *jettiſon*, the ſhip and the remainder of the goods, were taken by the *French*.—It appeared on the trial, that the ſhip was taken on the 23d of *December* 1756; and the maſter, mates, and all the ſailors, except an apprentice and a landman, were taken out of her and carried to *France*. The ſhip remained in the hands of the *French eight days*, and was then retaken by a *Britiſh* privateer, and brought into *Milford Haven* on the 18th of *January*; and *immediate notice* was given by the inſured to the underwriters, with an offer to abandon. Before the capture, the ſhip, in a violent ſtorm, was ſeparated from her convoy, and ſo diſabled as to be incapable of proceeding on her voyage, without going into ſome port to refit. Part of her cargo

was thrown overboard in the storm, and the rest spoiled, while the ship lay at *Milford Haven*, after the offer to abandon, and before the ship could be refitted.—Upon this case, two questions were made; 1st, Whether this was a loss by capture for which the insurers were liable. 2dly, Whether, under all the circumstances, the insured had a right to abandon the ship to the insurers after she was carried into *Milford Haven*.—The court, upon great consideration, were clearly of opinion, that the loss was total by the capture; and that, after the voyage was defeated, the right which the owner had to obtain restitution of the ship and cargo, paying salvage to the recaptors, might be abandoned to the insurers, after she was brought into *Milford Haven*.—Lord *Mansfield* delivered the opinion of the court. The decision of the first point has been already mentioned in its proper place (*a*). Upon the second point, his lordship said,—"The single question upon which this case turns, is, whether the insured had, under all the circumstances, an election to abandon on the 18th of *January*. The loss and disability were in their nature total at the time they happened. During eight days the plaintiff was entitled to be paid by the insurer, as for a total loss; and, in the case of a recapture, the insurer would have stood in his place. The subsequent recapture is, at best, a saving only of a small part: *Half the value must be paid for salvage*. The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter-party was dissolved. The freight, except in the proportion of the goods saved, was lost. The ship was necessarily brought into an *English* port. What could be saved might not be worth the expence necessarily attending it. The subsequent title to restitution arising from the recapture, at a great expence (*b*), of a ship disabled from pursuing her voyage,

A title to restitution arising from recapture, cannot take away a vested right to abandon, if the ship be unfit to perform the voyage.

(*a*) Sup. 129.——(*b*) By 29 G. II. c. 34. § 8. a moiety of the value of the captured ship was given to privateers, if the prize was above 96 hours in the possession of the enemy. But now by 43 G. III. c. 160, § 39, the salvage in all cases of recapture, by privateers, is fixed at one-eighth.

voyage, cannot take away a right vested in the insured at the time of the capture. But, because he cannot recover for any more than the loss he has sustained, he must abandon what may be saved. The better opinion of the books says,—"*Sufficit semel extitisse conditionem, ad beneficium assecuratori, de amissione navis; etiam quod postea sequeretur recuperatio: Nam per talem recuperationem non poterit præjudicari assecuratio* (a)." I cannot find a single book, ancient or modern, which does not say that, in case of a ship *being taken*, the insured may demand as for a total loss and abandon. What proves the proposition most strongly is, that by the general law, he may abandon in the case merely of arrest, or an embargo, by a prince not an enemy (b). Positive regulations in different countries, have fixed a precise time before the insured should, in that case, be at liberty to abandon. The fixing a precise time proves the general principle. Every argument holds strongly in the case of the other policy, with regard to the goods. The cargo was, in its nature, perishable, destined from *Newfoundland* to *Spain* or *Portugal*; and the voyage was as absolutely defeated, as if the ship had been wrecked, and a third or fourth of the goods saved. No capture by the enemy can be so total a loss as to leave no possibility of recovery. If the owner himself should retake at any time, he will be entitled; and by the stat. 29 *G.* II. c. 34, § 24, if an *English* ship retake at any time, before the condemnation or after, the owner is entitled to restitution, upon stated salvage. This chance does not suspend the demand upon the insurer for a total loss: But justice is done by putting him in the place of the insured, in case of a recapture. In questions on policies, the nature of the contract, as an indemnity and nothing else, is always liberally considered. There might be circumstances, under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: As if a ship were taken, and, in a few days, escaped entire, and pursued her voyage. There are circumstances

The insured may abandon upon a mere arrest or embargo by a prince not an enemy.

But not when the capture proves but a small temporary hindrance.

(a) Roccus n. 66. — (b) Vid. sup. ch. 10, § 5.

under

under which it would be deemed an average loſs: If a captured ſhip be immediately ranſomed (*a*) by the maſter, and purſue her voyage: there the money paid is an average loſs. And in all caſes the inſured may chuſe not to abandon (*b*). In the ſecond part of the uſages and

The inſured is in no caſe *obliged* to abandon.

cuſtoms of the ſea, (a tranſlation from the *French*), a treatiſe is inſerted called *Le Guidon*, in which, after mentioning the right to abandon upon a capture, it is added, "or any other ſuch diſturbance as defeats the voyage; or makes it not worth while, or not worth the freight, to purſue it (*c*)." I know that, in late times, the privilege of abandoning has been reſtrained for fear of letting

And he cannot, merely by abandoning, turn a partial into a total loſs.

in frauds: And the merchant cannot elect to turn what, at the time when it happened, was in its nature, but an average loſs, into a total one, by abandoning. But there is no danger of fraud in the preſent caſe. The loſs was total at the time it happened; and continued total, as to the deſtruction of the voyage. Nothing could be recovered, but upon payment of more than half the value, including the coſts. What could be ſaved of the goods might not be worth the freight for ſo much of the voyage as they had gone when they were taken. The cargo, from its nature, muſt have been ſold where it was brought in. The loſs, as to the ſhip, could not be eſtimated, nor the ſalvage of half be fixed, by a better meaſure than a

(*a*) Since this judgment was delivered, the ranſoming of ſhips captured by the enemy has been prohibited by ſtat. 22 *G.* III. c. 35. ſup. 504.——(*b*) *Le Guidon*, ch. 7, art. 1, ſays that abandonment depends on the will of the inſured, who may reſort to it as an *extreme remedy* ——(*c*) The paſſage in *Le Guidon* to which his lordſhip alludes, c. 7, § 1, is in theſe words: "*Il eſt en liberté au marchand chargeur faire* delais *à ſes aſſureurs, c'eſt à dire, quitter et delaiſſer ſes droits, noms, raiſons, et actions, de la proprieté qu'il a en la marchandiſe chargée, dont il eſt aſſeuré, lors, et quand il advient naufrage du tout ou de partie, ou bien avarie qui excéde ou endommage la moitié de la marchandiſe, quand il y a priſe d'amis ou d'ennemis, arreſt de prince, ou autre tel diſtourbier en la navigation; ou telle empirance en la marchandiſe, qu'il n'y ait moyen l'avoir fait naviger à ſon dernier réſte,* ou qu'elle ne valut le frêt, ou peu de choſe d'avantage."

ſale.

sale. In such a case, there is no colour to say that the insured might not disentangle himself from unprofitable trouble and further expence, and leave the insurer to save what he could. It might as well be argued that if a ship which had sunk, was weighed up again at a great expence, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved."

In the above case Lord *Mansfield* declared, "*that he could not find a single book, ancient or modern, which did not say that, in case of a ship being taken, the insured may demand as for a total loss, and abandon.*"—The unqualified terms in which this is expressed, soon gave rise to a notion that the immediate consequence of a capture was a *change of property* in the thing insured, and that this gave the insured a vested right to a total loss, with liberty to abandon when he pleased; and that this right could not be divested by any subsequent event.—That Lord *Mansfield* did not mean to be thus understood is obvious from the whole of his judgment in that case: But another case soon after occurred which afforded him an opportunity of explaining his own meaning in that judgment, and of ascertaining and settling those principles of law which have governed all the cases to which they were applicable, from that time to the present.

It is not because a ship has once been captured, that the insured may abandon at any time afterwards.

In this case it was settled, after solemn argument, and upon great consideration, that if the thing insured be recovered before any loss is paid, the insured can only be entitled to a total or a partial loss, according to the final event. This agrees with *Roccus* who puts this question: —*Assecurator qui jam solvit æstimationem mercium deperditarum, si postea dictæ merces appareant et recuperatæ sint, an possit cogere dominum ad accipiendas illas, et ad reddendam sibi æstimationem quam dedit?*—To this question he answers thus: *Distingue: Aut merces aut aliqua pars ipsarum appareant, et restitui possint ante solutionem æstimationis; et tunc tenetur dominus mercium illas recipere, et pro illa parte mercium apparentium liberabitur assecurator: Nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur. Et etiam, quia contractus assecurationis est conditionalis, scilicet, si merces deperdantur: Non autem dicuntur deperditæ, si postea reperiantur. Verum, si merces non appareant*

If the thing insured be recovered before any loss is paid, the insured is only entitled to a partial or a total loss, according to the final event.

in illa pristina bonitate, aliter fit æstimatio; non in totum, sed prout tunc valent. Aut vero post solutam æstimationem ab assecuratore compareant merces, et tunc est in electione mercium assecurati, vel recipere merces vel retinere pretium (a).

Hamilton v. *Mendes*, 2 *Bur.* 1198, 1 *Bl.* 276.

A ship is captured, and all the hands but the mate and another man taken out of her. After 17 days, she is recaptured and sent into an *English* port, where she arrives a month after the capture;—The voyage not being lost, the insured shall not be allowed to abandon after the ship's arrival.

The case above alluded to, was an insurance on the ship *Selby, valued at* 1200l. and goods on board, from *Virginia* to *London*.—The ship sailed on the 28th of *March* 1760, from *Virginia* for *London*, and on the 6th of *May* was captured by a *French* privateer. The captain and six men were taken out of the ship, and only the mate and one man left on board. The *French* put a prize-master and several men on board to carry the ship to *France*; but in the way thither, she was retaken on the 23d of *May* and sent into *Plymouth*, where she arrived the 6th of *June*. The plaintiff, at *Hull*, as soon as he was informed of what had befallen his ship, wrote on the 23d of *June* to his agent in *London*, with directions to abandon.—The agent, on the 26th of *June*, acquainted the defendant with the offer to abandon, to which the defendant answered, 'that he did not think himself bound to take to 'the ship, but was ready to pay the salvage, and all 'other losses and charges that the plaintiff had sustained 'by the capture.'—On the 19th of *August* the ship, which had sustained no damage by the capture, was brought to *London* by order of the owners of the cargo and the recaptors, and the whole cargo delivered to the freighters, who paid the freight without prejudice.—The question on this case was, whether the plaintiff, on the 26th of *June*, had a right to abandon, and to recover as for a total loss?—The court determined that he had no right to abandon, and that he could recover as for a partial loss only.—Lord *Mansfield*, in delivering the opinion of the court said,—"The plaintiff has averred in his declaration, as the basis of his demand for a total loss, *that, by the capture, the ship became wholly lost to him*. The general question is, whether the plaintiff, who, at the time of his action brought, at the time of his offer to abandon, and at the time of his being first apprized of any accident

(a) *Roccus*, h. t. n 9, 50.

having

having happened, had only, in truth, sustained a *partial loss*, ought to recover as for a *total loss*. In support of the affirmative, the counsel for the plaintiff insisted upon the four following points: 1. That, by the capture, *the property was changed*, and therefore the loss total for ever; 2. That if the property was not changed, yet the *capture* was a total loss; 3. That when the ship was brought into *Plymouth*, particularly on the 26th of *June*, the recovery was not such as, in truth, changed the total into an average loss; 4. That, supposing it did, yet the loss having once been total, a right *vested* in the insured to recover the whole, upon abandoning; which right could never afterwards be *divested*, or taken from him, by any subsequent event.—As to the *first point*: If the change of property was at all material, as between the insurer and the insured, it would not be applicable to the present case; because, by the marine law received and practised in *England*, there is no change of property, in the case of a capture, till condemnation; and now by the act of parliament (*a*), in case of a recapture, the *jus postliminii* continues for ever. Many writers argue, between the insurer and the insured, from the distinction, whether the property was, or was not, so changed by the capture, as to transfer a complete right from the enemy to a recaptor, or neutral vendee, against the former owner. But arbitrary notions concerning the change of property by capture, as between the former owner and recaptor or vendee, ought never to be the rule of decision, as between the insurer and insured, upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree, upon the *second point*, that, by the capture, *while it continued*, the ship was totally lost; but it must be admitted that the property, in case of recapture, never was changed, but returned to the former owner.—The *third point* depends, as every question of this kind must, upon the particular circumstances. It does not *necessarily* follow, that, because there is a recapture, therefore the loss ceases to be total. If the voyage be absolutely lost, or not worth pursuing: If the sal-

The property is not changed by capture, till condemnation But now the *jus postliminii* continues for ever.

While the ship is in the hands of the enemy, she is considered as totally lost; but the property revests upon a recapture.

(*a*) 29 G. II. c. 34. § 24.

In what cases a loss may be said to be total.

vage be very high: If further expence be necessary: If the insurer will not engage, at all events, to bear that expence, though it should exceed the value, or fail of success: Under these, and many other like circumstances, the insured may disentangle himself and abandon, notwithstanding there was a recapture. The *Guidon* (*a*), amongst other instances of a total loss, where the insured may abandon, says, "*If the damage exceed half the value of the thing insured; or if the voyage be lost, or so interrupted that the pursuit of it is not worth the freight.*" But, in the present case, the voyage was so far from being lost, that it had met with only a short temporary obstruction; the ship and cargo were both safe; the expence incurred did not amount to near half the value; and when the offer was made to abandon, the insurer undertook to pay all charges and expences which the insured should be put to by the capture. The only argument to shew that the loss had not, upon the recapture, ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put a stop to any further prosecution of the voyage. But that is not so. The property *returns* to the owner, pledged to the recaptors for the amount of the salvage. Upon paying this he is entitled to restitution. The recaptor in this case had no right to sell the ship. If they had differed about the value, the court of admiralty would have ordered a commission of appraisement: It was the interest of all parties that the ship should forthwith proceed to *London*. Had the recaptor opposed it, or affected delay, the court of admiralty would have made an order for bringing her to her port of delivery, upon reasonable terms. Therefore it is clear that, on the 26th of *June*, the ship had sustained no other loss than a short temporary obstruction, and a charge which the defendant offered to pay.—As to the *last point*: The plaintiff's demand is for an indemnity. His action, then, must be founded on the nature of his damnification, as it really was, at the time of the action brought. It is repugnant, upon a contract of *indemnity*,

Upon a recapture the property returns to the original owner, pledged for the salvage.

Though there have at one time been a total loss, the insured cannot abandon after the *final event* has determined it to be only a partial loss.

(*a*) Ch. 7, § 1.

to

to recover as for a total loſs, when the final event has determined that the damnification is, in truth, an average loſs. Whatever undoes the damnification, in whole or in part, muſt operate upon the indemnity, in the ſame degree. It is a contradiction in terms to ſay that an action will lie for an indemnity, when, upon the whole event, no damage has been ſuſtained."—To illuſtrate this, and to ſhew that, by the common law, the injury being repaired before the action was brought, is an anſwer to the action, he put the caſe of an action of waſte brought againſt a tenant, after he had repaired (*a*); and of an action brought by a ſurety ſued to judgment, againſt his principal, after the principal had paid the debt and coſts, and entered ſatisfaction on record. He then ſaid;—"But, in the preſent caſe, the notion of a veſted right in the plaintiff to ſue as for a total loſs, before the recapture, is only fictitious and not founded in truth: For the inſured is not obliged to abandon, in any caſe. He has an election. No right can veſt, as for a total loſs, till he has made that election. He cannot elect before advice is received of the loſs; and if that advice ſhew the peril to be over, and the thing inſured in ſafety, he cannot elect at all; becauſe he has no right to abandon when the thing is ſafe. Writers upon the marine law are apt to embarraſs general principles with the poſitive regulations of their own country: But they ſeem all to agree that, if the thing be recovered before the money is paid, the inſured can only be intitled according to the final event (*b*).—In the caſe of *Spencer* v. *Franco* (*c*), though upon a *wager policy*, the loſs was held not to be total, after the return of the ſhip in ſafety; though ſhe had been ſeized, and long detained by the King of *Spain*, in a time of actual war.—In the caſe of *Fitzgerald* v. *Pole* (*d*), though upon a wager policy, the majority of the Judges, and the Houſe of Lords, held there was no total loſs; the ſhip having been reſtored before the end of the four months, the time for

There is no *veſted* right to recover as for a total loſs, till the inſured, having a right to abandon, elects to do ſo.

If a ſhip be recovered after a long detention, it is not a total loſs, even upon a wager policy.

(*a*) Vid. Co. Lit. 53, a.———(*b*) Vid. *Roccus*, Not. 50, ſup. 565.———(*c*) Sup. 514.———(*d*) 5 Bro. Parl. Ca. 131, inf.

which ſhe was inſured.—The preſent attempt is the firſt that was ever made to charge the inſurer, as for a total loſs, upon an *intereſt* policy, after the thing was recovered: And it is ſaid, the judgment in *Goſs* v. *Withers* gave riſe to it."—Here he recapitulated the grounds of the judgment in that caſe (*a*), and proceeded thus,—"But it is ſaid that though the caſe of *Goſs* v. *Withers* was entirely different, ſome part of the *reaſoning* warranted the propoſition now inferred by the plaintiff from it. The great principle relied upon was, that, as between the inſurer and inſured, the contract being an indemnity, the *truth* of the facts ought to be regarded; and therefore there might be a total loſs by a capture, which could not operate a change of property; and a recapture ſhould not relate by fiction, like the *Roman jus poſtliminii*, as if the capture had never happened, unleſs the total loſs was in truth recovered. This reaſoning proved, *à converſo*, that if the thing, *in truth* was ſafe, no artificial reaſoning ſhall be allowed to ſet up a total loſs. The words quoted at the bar were certainly uſed (*b*), 'that there is no book, 'ancient or modern, which does not ſay that, in caſe of 'the ſhip being taken, the inſured may demand as for a 'total loſs, and abandon.' But the propoſition was applied to the ſubject matter, and is certainly true, provided the capture, or the total loſs occaſioned thereby, *continue to the time of abandoning, and bringing the action*. The caſe then before the court did not make it neceſſary to ſpecify all the reſtrictions. But I will read to you *verbatim*, from my notes of the judgment then delivered, what was ſaid, to prevent any inference being drawn beyond the caſe then determined."—Here he read ſeveral paſſages from his argument in *Goſs* v. *Withers*, which is fully ſet forth in the foregoing account of that caſe, and then proceeded;—"From this way of reaſoning it by no means followed, that if the ſhip and cargo had, by the recapture, been brought ſafe to the port of delivery, without having ſuſtained any damage at all, the inſured might abandon. But without dwelling longer upon principles or autho-

A paſſage in the judgment of *Goſs* v. *Withers*, explained.

(*a*) Sup. 568.——(*b*) Vid. ſup. 569.

rities,

rities; the consequences of the present question are decisive. It is impossible that any man should desire to abandon, in a case circumstanced like the present, but for one of two reasons: either because he has *over-valued*; or because the *market has fallen* below the original price. The only reasons which can make it the interest of the party to *desire* to abandon, are conclusive against allowing it. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer, if he be permitted to abandon; and he can only desire it because he has over-valued. This was avowed upon the first argument; and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less, upon a contract of indemnity than the *value* of the loss; and the insured ought never to receive more. Therefore, if there were occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But, upon *principle*, this action could not be maintained as for a total loss, if the question were to be judged by the strictest rules of the common law: Much less can it be supported for a total loss, as the question ought to be decided by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the fact. The property, and daily negotiations of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained; because they are the dictates of common sense, drawn from the truth of the case. If the question depend upon the fact, every man can judge of the nature of the loss, before the money be paid: But, if it depend upon *speculative refinements*, from the law of nations, or the *Roman jus postliminii*, concerning the change, or revesting, of property; no wonder merchants are in the dark, when *doctors* have differed upon the subject from the beginning, and have not yet agreed.—To obviate too large an inference being drawn from this determination, I desire it may be understood, that the point here determined is, *That the plaintiff upon a policy can only recover an indemnity, according*

When the ship is safe and the voyage not lost, the insured ought not to be permitted to abandon.



The insurer ought never to pay less than the *value* of the loss, nor the insured receive more.

The insured can only recover an indemnity for

his loss at the time of the action brought, or offer to abandon.

according to the nature of his case, at the time of the action brought, or, at most, at the time of his offer to abandon. We give no opinion, how it would be, in case the ship and goods were restored in safety between the offer to abandon and the action brought, or between the commencement of the action and the verdict: And particularly I desire that it may not be inferred, that in case the ship or goods should be restored, *after the money is paid as for a total loss,* the insurer could compel the insured to refund the money and take the ship or goods. That case is totally different from the present, and depends throughout, upon different reasons and principles. Here, the event had fixed the loss to be an average loss only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident; consequently before he could make an election. Therefore, under these circumstances, we are of opinion that he cannot recover for a total loss, but for an average loss only; the amount of which is ascertained by the jury.—The judgment must be entered up as for the average loss stated in the case; viz. 10l. *per cent.*"

If, after a total loss has been paid, the ship be restored, the insured shall not be obliged to refund.

If, upon a recapture the captain sell the ship and cargo, as being the best to be done for all concerned; the insured may abandon.

The following case will shew that if, upon a recapture, the captain find that the voyage cannot be pursued, and, acting fairly for the benefit of all concerned, he sell the ship and cargo to pay the salvage, and thereby put an end to the voyage; the insured may abandon, and recover as for a total loss.

Miller v. Fletcher, Doug 219.

A ship and goods are captured and recaptured, and put in possession of the captain, who disposes of both and puts an end to the voyage; and in so doing, acts to the best of his judgment for the benefit of all concerned: The insured may *abandon*, and demand as for a *total loss.*

A ship and freight were insured from *Montserrat* to *London*:—The ship was taken on her voyage on the 23d of *May* by two *American* privateers, who took the captain and all the crew, and part of the cargo, (which consisted of sugars), out of her; and also took away the rigging. She was afterwards retaken, and carried into *New York*, where the captain arrived on the 23d of *June*, and, taking possession of the ship, found that part of what had been left on board of the cargo, was washed overboard; that 57 hogsheads of what remained were damaged, and that the ship was leaky, and could not be repaired without unloading her entirely. The owners had no storehouse at *New York*. No sailors were to be had there; and the only method

method he had of paying the salvage, was by sale of the ship or part of the cargo. He did not know of the insurance. The expence of repairing the ship would have exceeded the freight by more than 100l. There was an embargo on all vessels at *New York* till the 27th of *December*, and his ship ought to have arrived at *London* in *July* Upon consulting with his friends at *New York*, he resolved to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for; but the person who agreed to buy her ran away; and the captain left her in a creek near *New York*, and returned to *England*, where he arrived in the *February* following, and informed the plaintiff of what he had done. The plaintiff immediately claimed from the underwriters as for a total loss, and offered to abandon.—The underwriters resisted this claim. The insured brought an action on the policy, claiming as for a total loss. The defendant insisted that it was only an average loss.—Lord *Mansfield*, who tried the cause, told the jury, that if they were satisfied *that the captain had done what was best for the benefit of all concerned*, they must find as for a total loss. The jury found a verdict according to this direction; and upon a motion for a new trial, the court were clearly of opinion that the plaintiff had a right to *abandon*, and claim as for a total loss.—Lord *Mansfield* said;—" On the trial of this cause, it did not appear to me that there was any question of law, and no case was asked for. It was impossible to ask for one till the facts were ascertained; and when ascertained, it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended that a capture *necessarily* amounts to a total loss, as between insurer and insured; nor, on the other hand, that, on a capture and recapture, there may not be a total loss, though there remains some material tangible part of the ship and cargo. Neither was it contended that the captain has an arbitrary power, by his own act, to make the loss either partial or total, as he pleases. The question is simply this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a *total obstruc-*

A capture does not necessarily amount to a total loss; nor does a recapture prevent its being total.

tion of the voyage, or only a *partial ſtoppage*, as in the case of *Hamilton* v. *Mendez* (*a*). In that caſe, and in *Goſs* v. *Withers* (*b*), great ſtreſs was laid on the ſituation of the ſhip and cargo, at the time when the inſured *had notice*, at the time of the offer *to abandon*, and at the time of the *action brought*. No caſe ſays, that the bare exiſtence of the hulk of the ſhip prevents the loſs being total. The caſes where the inſured may abandon are, 'If the voyage be loſt; or not worth purſuing;—If the 'ſalvage be high;—If further expence be neceſſary;—'If the inſurer will not, at all events, undertake to pay 'that expence (*c*), &c.' Here, at the time of the capture, there were no hopes of a recovery; no friend's ſhip in ſight; no means of reſiſtance; all the crew taken out, and part of the cargo and the rigging alſo taken away. When the ſhip was retaken and brought to *New York*, it ſtill continued a total loſs. Neither the inſured nor the inſurers, had any agent in the place. The court of admiralty muſt have proceeded *ſecundum æquum et bonum*, and might have ſold her for the benefit of thoſe concerned. When the inſured firſt had notice and offered to abandon, and when the action was brought, it was ſtill a total loſs. The voyage was abandoned, the cargo ſold, and the ſhip left to be ſold. The only anſwer the defendant makes, or can make to this, is, that the loſs was total, indeed, but the captain made it ſo by his improper conduct; for that, on his taking poſſeſſion of the ſhip, the loſs became partial, and that he ought to have purſued the voyage. But was this defence true in fact? The captain, when he came to *New York*, had no expreſs order, but he had an implied authority, from both ſides, to do what was right and fit to be done, as none of them had agents in the place. And for the conſequences of whatever it was right for him to have done, if it had been his own ſhip and cargo, the underwriter muſt anſwer; becauſe this is within the contract of indemnity. Suppoſe there had been no inſurance, what ought the captain to have done? 1. As to the *cargo*: According to the courſe of the voyage, the ſhip ſhould have arrived at *London* in *July*. On

In what caſes the inſured may abandon.

The captain has an implied authority to do the beſt he can for the benefit of all concerned, and the inſurer is bound by his acts.

(*a*) Sup. 572.——(*b*) Sup. 567.——(*c*) Vid. ſup. 562.

the capture, part had been taken out, ſome had been waſhed overboard, ſome damaged, and the whole, from the leakineſs of the veſſel, in a periſhable ſtate. There were no ſtore-houſes, nor could the ſhip proceed in the ſtate ſhe was in. The crew was gone, and an embargo laid on till *December*. What! ſhall a cargo, which was intended to arrive at *London* in *July*, be kept in a periſhable ſtate at *New York*, in a leaky veſſel, till *December*? 2. As to the *ſhip*: It was certainly better to ſell her than to bring her to *London*. There was no crew belonging to her, and ſhe had no cargo. Even if all the cargo had been left, the expence of repairs would have exceeded the freight. If ſhe had been brought home, the expence of bringing her might have been more than what ſhe would have ſold for in *London*. It has been ſaid, that the damage would not have fallen on the underwriters; but the argument drawn from thence is a fallacy, for that circumſtance goes to determine it to be the intereſt of the inſured to abandon the voyage. The queſtion is, what did the owner ſuffer by the capture; and it appears that he ſuffered ſo much that it was not worth while to purſue the voyage. The whole voyage was loſt. As the captain did not know of the inſurance, he had no temptation to give the turn of the ſcale to the one ſide or the other. I left it to the jury to determine whether what the captain had done, was *for the benefit of the concerned*. If they had found that it was, in words, where would have been the queſtion of law (*a*)?"

So, if the ſhip be ſold by the captors, and the captain acting as agent for the owners, purchaſe the ſhip on their account; this ſhall be conſidered as a recovery of the ſhip for the owners, and the money thus paid, as ſalvage; and if the voyage can be proſecuted, this is only a partial, and not a total, loſs.

If the captain purchaſe the ſhip from the captors for account of his owners; the money paid is only a partial loſs.

Thus.—A ſhip inſured for ſix months, was captured and carried into *Charleſtown*, where ſhe remained upwards

M'Maſters v. *Shoolbred*, 1 Esp. Rep. 237.

(*a*) In *Plantamour* v. *Staples*, ſup. 169. Mr. Juſtice *Buller* adopts this doctrine, viz. that the inſurers are bound by the acts of the captain, when he does what *he deems beſt* for the benefit of all concerned.

 of

of a month, and then was fold by the captors, and purchafed by the captain for account of the original owners.—In an action on the policy, the defendant paid 60l. *per cent.* into court, as for a partial lofs.—The plaintiff contended, that the fhip having been captured and fold by the captain, after fhe had been a month in their poffeffion, this was a total lofs.—Lord *Kenyon*, who tried the caufe, held that this was only to be confidered as a partial lofs, and that the owners could not abandon. He confidered the captain as agent for the owners, recovering the veffel upon their account, and the price as a kind of falvage, the amount of which would be the lofs fuftained, and which only conftituted an average lofs. He admitted, however, that when the fhip had been captured, and was carried into port, in the enemy's poffeffion, the infured might, at that period, have abandoned. But not having abandoned till after the fhip was recovered, they could now only go as for a partial lofs.—The jury found a verdict according to this direction.

Having laid before the reader the authorities upon queftions of abandonment upon loffes by capture and arreft of princes, we will now proceed to confider,

2. *Of the right of abandoning in other cafes.*

Shipwreck is confidered as a total lofs.

Shipwreck is generally a total lofs. What may be faved of the fhip or goods is fo uncertain, and depends fo much on accident, that the law cannot diftinguifh this from the abfolute deftruction of the whole. The wreck of the fhip may remain and may be faved, but the fhip is loft. A thing is faid to be deftroyed when it is fo broken, disjointed, or otherwife injured, that it no longer exifts in its original nature and effence. So, the goods may remain; but if no fhip can be procured in a reafonable time, to carry them to their place of deftination, the voyage is loft, and the adventure fruftated.

But a ftranding is not, of itfelf, deemed a total lofs.

But the mere *ftranding* of the fhip is not, of itfelf, deemed a total lofs, fo as to entitle the infured immediately to abandon. If, by fome fortunate accident, by the exertions of the crew, or by any borrowed affiftance, the fhip be got off and rendered capable of continuing her voyage,

voyage, it is not a total loſs, and the inſurers are only liable for the expences occaſioned by the ſtranding. It is only where the ſtranding is followed by *ſhipwreck*, or in any other way renders the ſhip incapable of proſecuting her voyage, that the inſured is entitled to abandon (*a*).

No partial loſs, however great, can be turned into a total loſs.

It is a rule that, to entitle the inſured to abandon, there muſt have been, at ſome period of the voyage inſured, or during the continuance of the riſk, a total loſs; and the following caſes will ſhew that no partial loſs, however great, occaſioned by the perils of the ſea, can be turned into a total loſs.

Cazalet v. St. Barbe, 1 T. R. 187.

A ſhip performed her voyage, but was ſo damaged as not to be worth repairing; yet, as the damage was only eſtimated at 48 *per cent*, this is not a total loſs, and the inſured cannot abandon.

An inſurance was made on the ſhip *Friendſhip* from *Wyburgh* to *Lynn*.—In an action on the policy, the defendant pleaded a tender of 48l.—The plaintiff claimed as for a total loſs, and upon the trial of the cauſe, it appeared that the ſhip had ſuffered ſo much in her voyage, that when ſhe arrived at *Lynn*, ſhe was not worth repairing. The damage, however, ſuſtained by the ſhip, did not exceed 48 l *per cent.* the ſum which the defendant had paid into court upon his plea of tender.—Upon this caſe the defendant inſiſted that this was a *partial*, and not a total, loſs, and that therefore the plaintiff had no right to abandon.—The court were clearly of opinion that the owner cannot abandon, but in the caſe of a total loſs, and that they could not determine that there had been *a total loſs*, when the jury found that there was only a loſs of 48l. *per cent.*—Mr. Juſtice *Aſhurſt* ſaid, "It will be making the inſurers anſwerable for the goodneſs of the ſhip, if they are held liable for more than 48l. *per cent.* It is ſtated that the ſhip was not worth repairing; but *non conſtat* that, if the ſhip had not received any damage during the voyage, ſhe would have been worth repairing: And though ſhe was not in a ſound ſtate, yet ſhe had been 24 hours in ſafety; and the jury having aſcertained the amount of the damage ſhe has ſuſtained, I cannot ſay that the plaintiff ought to recover more."—Mr. Juſtice *Buller* ſaid, "Nothing can be better eſtabliſhed than that the *owner* of a ſhip can only abandon in the caſe of a total loſs hap-

(*a*) Vid. *Emerig.* tom. 2, p. 180.

pening *at some period or other of the voyage*; which cannot have happened in this case, as the jury have expressly found thar the loss amounted to 48l. *per cent.* In the case of *Jenkins* v. *Mackenzie*, though the ship was brought into port, yet the capture, *as between the insurer and the insured*, was a total loss. The true way of considering this case is, that it was an insurance *on the ship, for the voyage*; and if either the ship or the voyage be lost, it will be a total loss; but here neither was lost. The case of *Hamilton* v. *Mendez* (a) is decisive."

Furneaux v. *Bradley*, B. R. *East.* 20 G. III. *Park* 166

A ship, insured for six months, receives an injury *within the time*; and the captain being unable to get her repaired, sells her, *after the time*: This is only a partial loss.

Thus:—The ship *Prince of Wales* was insured, 'In port or at sea, for six months from the 18th of *July* 1777.'—She was in government service, and bound from *Cork* to *Quebec*. She arrived there; but the season being far advanced before she was ready to return, she was removed into the bason; from whence on the 19th of *November* she was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined into, till the *April* following, after the expiration of the policy. She was then found to be bulged, and much injured, but not irreparably so. In the progress of the repair, difficulties arose for want of materials; and the captain, after consulting the merchants and agent in the place, sold her. An account of the loss was made up, charging the insurers for the whole amount, and crediting them for the money for which the ship was sold, as salvage.—Lord *Mansfield*, at the trial, said,—" The great point in the case is, whether there be a total loss occasioned by this accident. It is a new question, upon which I shall reserve a case for the opinion of the court."—A case being reserved, the court, after argument, were of opinion, that the ship should be considered as *damaged*, on the 19th of *November*, but not *totally lost*.—Lord *Mansfield* said, the justice of the case seemed to be that the loss in *November* should be taken as an *average*, not as a *total* loss.

Fitzgerald v. *Pole*, 5 *Bro. Parl. Ca.* 131; *Wilkes*, 641.

A privateer, insured for four months *free from average*, is

So, where the *Good Fellow* privateer was insured, 'At and from *Jamaica* on a cruise for four months, valued

(a) Sup. 572.

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'at 1000l. without further account, *and free from average.*' —Upon a ſpecial verdict it appeared, that while the privateer was on her cruiſe, and within the four months, the crew mutinied againſt the captain and his officers, and by force carried the ſhip to *Jamaica*, and, before her arrival there, by force, ſeized the boat, fire-arms, and cutlaſſes, carried them off, and deſerted the ſhip, whereby the voyage and cruiſe were prevented and loſt for the remainder of the four months; that the ſhip arrived at *Jamaica*, but not till after the end of the four months.—Upon this caſe the King's Bench gave judgment for the plaintiff.—Upon a writ of error, the Exchequer Chamber unanimouſly reverſed that judgment; and the Houſe of Lords confirmed the judgment of reverſal, being of opinion, with the majority of the judges, that the inſurer, being, by the terms of the policy, free from all average, the plaintiff could not be entitled to recover but in caſe of a total loſs; and the ſhip being found, by the ſpecial verdict to be in good ſafety, at her proper port, at and after the end of the four months, for which the inſurance was made, there could be no loſs (*a*).

forced into port by a mutiny of the crew, but is in ſafety at her port after the four months are expired:—The inſured can recover for no loſs;—not for an average loſs, becauſe the inſurance was *free from average*; and not for a *total loſs*, becauſe it was only an average loſs.

If, by any accident or misfortune, the ſhip be prevented from proceeding on her voyage, and the voyage be thereby loſt; this is a total loſs, not only of the ſhip and freight, but alſo of the cargo, if no other ſhip can be procured to carry it to its port of deſtination.

But if the voyage be loſt, from whatever cauſe, it is a total loſs.

Thus:—An inſurance was made on the ſhip *Grace*, her cargo and freight, 'At and from *Tortola* to *London*; 'warranted to depart on or before the 1ſt of *Auguſt* 1781. 'The ſhip valued at 2,470l. the cargo at 12,400l. and 'the freight at 2,250l.; at 25 guineas *per cent.* to return

Manning v. *Newnham*, B.R. Tr. 22 *G.* III. MS.

On a voyage from *Tortola* to *London*, the ſhip by ſea damage is obliged to put back on the third day, and cannot be repaired there, and no other ſhip can be got for the cargo:—This is a total loſs of the ſhip, freight, and cargo, and the inſured may abandon.

(*a*) It has been ſaid (*Park*, 170.) that caſes like the preſent can never ariſe again, becauſe it originated in a wager policy, which is prohibited by law.—The policy, in this caſe, can ſcarcely be ſaid to have been a wager-policy: It was rather a valued policy, free from average: But it muſt be recollected that there is in the ſtat. 19 *G.* II. c. 37, a proviſo to exempt privateers from the operation of the firſt clauſe, which prohibits inſurances intereſt or no intereſt; and therefore the policy in this caſe would be a good and valid policy at this day.

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'10 *per cent.* if ſhe departed with convoy from the *Weſt* '*Indies*, and arrived; *the ſhip, freight, and goods warranted* '*free of particular average.*'—The ſhip and cargo had been a *Dutch* prize, condemned at *Tortola*; but during four or five months that ſhe ſtaid there, was never unloaded. On the 1ſt of *Auguſt* the whole fleet of merchantmen, with their convoy, got under weigh; but not being able to get clear of the iſlands that day, they came to an anchor during the night, and the next day cleared the iſlands. About ten o'clock that day, ſeveral ſqualls of wind aroſe, which occaſioned the ſhip to ſtrain and make water ſo faſt, that the pumps were obliged to be worked; and on the 3d the captain made a ſignal of diſtreſs, and was obliged to return to *Tortola*. On her arrival there, the captain made his proteſt; and a ſurvey was had, by which the ſhip was declared unable to proceed to ſea with her cargo, upon a *London* voyage, and that ſhe could not be repaired in any of the *Engliſh* iſlands in the *Weſt Indies*. There was no evidence of any ſpecial damage to the cargo, which was ſold for a ſum, within 700l. of the value. The owners purchaſed two-thirds of it; the greateſt part of which might have been ſent home and ſold at a great profit. The inſured claimed as for a total loſs on the ſhip, cargo, and freight. At the trial, though the cargo was warranted free from average, yet it ſeemed dangerous ſo permit the inſured to abandon, and thus turn an average into a total loſs. The jury, however, thought the inſured entitled to what he claimed, and found accordingly.—Upon a motion for a new trial, the court, upon full conſideration, were of opinion that the verdict was right and ought to ſtand.—Lord *Mansfield* ſaid,—"At the trial, my prejudices were in favour of the underwriters; but upon better conſideration, I agree with the reſt of the court that the jury did right. *If, by the perils inſured againſt, the voyage be loſt and gone, it is a total loſs, otherwiſe not.* The ſhip received an irreparable hurt within the policy, which drove her back to *Tortola*, where only two ſhips could be had, both together not capable of taking the whole of the cargo on board. The voyage was ſo completely loſt, that no ſhip could be got; and the inſured were unable to ſend that part of the goods which

they had purchased, forward to *England*; and yet no body bought but to send to *England*. If the voyage could have been continued in another ship, there might have been freight *pro rata*. But it was admitted that there was a total loss on the freight, because the ship could not perform her voyage; and the insured were not to wait till ships could be had. The same argument applies to the ship and cargo. This is a contract of indemnity, and the insurance is that the ship shall come to *London*. Introducing nice distinctions is inconvenient and dangerous. Upon turning this case in every view, the court are of opinion that the voyage was totally lost; and this is the ground of our determination."

But though the voyage be lost, yet, if this have not been occasioned by the happening of any of the perils insured against, it will not be a loss within the policy. As if, in the course of the voyage, the captain be informed that the port of destination is in the hands of the enemy, or shut against ships of his nation, this will afford no ground for the insured to abandon (*a*), and though the cargo, being of a perishable nature, is lost in consequence of the disappointment (*b*). It can only be upon a loss expressly within the policy.

If a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight; this is clearly a total loss. This doctrine is warranted not only by the passage from *Le Guidon* which has been already cited, but also by the opinion of Lord *Mansfield* in the case of *Goss* v. *Withers* (*c*), and by that of Lord *Hardwicke* in the following case. If a cargo be damaged so as to be reduced in value to less than the freight, it will be a total loss.

An action was brought on a policy upon corn for 200 l. but of the value of 217 l., the defendant having suffered judgment to go by default, upon the execution of a writ of enquiry, before Lord *Hardwicke*, C. J. it appearing that the corn, being damaged, was sold for only *Boyfield* v. *Brown*. at N. P. 2 *Str*. 1065.

(*a*) Per Lord *Ellenborough* at N. P. in *Lubbeck* v. *Rowcroft*, sup. 220.——(*b*) R. *Hadkinson* v. *Robinson*, sup. 218. ——(*c*) Vid. sup. 567.

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67 l., and the freight came to 80 l.—Upon this, the question was, whether, as the freight exceeded the salvage, this was not to be considered as a total loss. For the plaintiff it was insisted that he ought not to be in a worse situation than if his corn had gone to the bottom; for then he would have had no freight to pay; but now that the voyage has been performed, whereby freight is become due, he has a right to apply the salvage to dischage it. It was proved to be the usage, that, where the salvage exceeds the freight, to deduct the freight out of the salvage, and make up the loss upon the difference.—For the defendant it was insisted that, as his insurance was upon the corn, and the whole did not perish, he ought, in making up the loss, to deduct the salvage: But no instance could be shewn, on either side, of an adjustment where the freight exceeded the salvage.—The Chief Justice was of opinion that, within the reason of deducting the freight, where the salvage exceeds it, the plaintiff, in this case, where it fell short, was intitled to have it considered as a total loss. The jury found according to this direction (*a*).

In what case the insured may abandon by the law of *France*.

In *France* the distinction is this: In case of shipwreck, the insured may abandon, though the goods be recovered and carried to their place of destination, because goods thus saved are generally in a bad and unmarketable condition. But if the ship become unnavigable, the insured cannot abandon the goods, if by any other ship they may be conveyed in time to their place of destination (*b*).

(*a*) This case was before the year 1749, when the common memorandum was introduced into policies, that corn, &c. should be free from average, unless general, or the ship be stranded. Vid. *Mason* v. *Scurray*, sup. 226. where, in a similar case, Lord *Mansfield* held it to be but a partial loss, for which, as that case was upon a policy with the common memorandum, the insurer was not liable.——(*b*) *Emerig*. tom. 2. p. 187, 188.

Sect.

Sect. II.

Within what Time the insured may abandon.

IF by any of the perils insured against, the ship and cargo be lost for a time, or the voyage be lost, so as to afford no present prospect of saving the one, or prosecuting the other with effect, this, while it lasts, amounts to a total loss, and the insured may abandon; but he is not, as we have already seen (*a*), in any case, bound to abandon. He may chuse whether he will take what can be saved, and demand as for a partial loss, or abandon, and claim as for a total loss. A loss may be total in its nature, and such that no subsequent event can render it partial; another, which at first shall be deemed total, may, by subsequent events, become partial. If the insured, while he has a right to consider the loss as total, elect to abandon, this will fix the nature of the loss; and no subsequent event can render it partial. It seems reasonable and necessary, therefore, that some time should be fixed when the degree of responsibility of the underwriter should be ascertained. The insured must not, by treating the accident for a time as a partial loss, take the chance of making the best of it for himself; and when he finds that it will not answer, attempt, by abandoning, to turn it into a total loss. In several maritime states on the continent, positive regulations have been established, limiting the time, after a loss has happend, within which the insured may abandon. In *France*, *Spain*, and *Holland*, the times are limited by law, according to the distance of the place where the loss happens, within which the abandonment must be made (*b*).

Some time should be fixed when the degree of the insurer's responsibility should be ascertained.

But the times thus limited must often prove either too long or too short, and frequently occasion great loss and

In *England*, the insured, as soon as he is informed of a total loss, must elect to abandon or not. If he mean to abandon, he must give reason-

(*a*) Sup. 564.——(*b*) Vid. Ord. de la mar. h. t. art, 48, 49; 2 *Mag*. 416.

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able notice to the insurers; otherwise he will wave his right to abandon.

inconvenience either to the insured or the insurer. In *England* we have no such positive regulation, nor any time limited by law for abandoning: Our courts have laid down a rule, which seems better suited to the practice of commerce, and more likely to prevent frauds than those we have just alluded to. This rule is, that as soon as the insured receives advice of a total loss, he must make his election whether he will abandon or not: If he determine to abandon, he must give the underwriters notice of this *within a reasonable time* after the intelligence arrives; and any unnecessary delay in giving this notice will amount to a waver of his right to abandon; for unless the owner do some act, signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage (*a*); unless, indeed, it be in effect total. This rule, which has been long established, is analogous to the general principle of the common law, which requires that all notices of acts, affecting the interests of third persons, shall be given *within a reasonable time*. In the following case this doctrine was first explicitly laid down by the court of King's Bench.

Mitchell v. *Edie*, 1 T. R. 608.

A ship being taken, the captor takes out her stores and part of her crew, and sets her at liberty: This obliging her to return into the nearest port, her voyage is lost, and her cargo, which is insured, is sold by an agent who becomes insolvent.—But, after three years, in which the insured adopts the acts of the agent, he shall not be at liberty to abandon, and throw the loss occasioned by the failure of the agent on the underwriters.

Goods were insured, 'from *Jamaica* to *London*.'—The ship was captured by an *American* privateer; and, in a few days afterwards, the captor, having stripped her of her stores and part of her rigging, and having taken out some of her hands, set her at liberty. There was a clause in the policy to exempt the underwriters from average losses under 3 *per cent.*: And the part of her cargo taken out did not amount to that sum. In consequence of the ship's losing a part of her crew, it became impossible for her to pursue her voyage, and she was obliged to bear away for *Charlestown*, where she was put into the hands of one *Cruden*, a part owner, who sold the cargo, but remitted none of the money home. In his books, he gave the *underwriters* credit for the amount. At the time of the sale he was in bad circum-

(*a*) Per *Buller*, J. 1 T. R. 616.

stances,

ftances, and afterwards became infolvent. It appeared, however, that the other owners looked to *Cruden* for two or three years for payment; during all which time, no notice of abandoning was given by the infured to the underwriters. In an action on the policy, the defendant paid a fum of money into court, being the amount of the average lofs.—Two queftions were made at the trial: *Firft*, whether the plaintiffs were entitled to recover as for a *total lofs*. Upon this, Mr. Juftice *Buller*, who tried the caufe, was of opinion that, as there had been a capture, which for a time had occafioned a total lofs, the owners had an option to abandon, or not, as they pleafed: But, if they had chofen to abandon, they ought to have done it immediately, upon receiving intelligence of the lofs; and, as they had not done fo, but had looked to *Cruden*, as their agent, for payment, they had waved their right to abandon, and could only recover as for a *partial lofs*. The fecond queftion arofe out of the particular circumftances of the cafe, not properly belonging to this branch of the fubject, and, indeed, of no general importance. The jury found a verdict for the defendant.—Upon a motion for a new trial, the court (*a*) were clearly of opinion that the plaintiff was not entitled to recover.—Mr. Juftice *Afhurft* faid;—" The general rule is, that where any part of the property infured has been faved, the infured cannot recover as for a total lofs, unlefs he make his election to abandon, and give reafonable notice to the underwriters of his intention. But it is contended that the infured never wave their right to abandon while they are managing in the beft manner they can for the benefit of all concerned: And that argument is grounded on the common claufe inferted in every policy, whereby the infured is authorifed, 'to fue, 'labour and travail, in and about the defence, fafeguard, 'and recovery of the goods, &c., without prejudice to 'the infurance.' Now this claufe does not warrant the pofition to the extent contended for. The meaning of

He might have abandoned, but he ought to have done fo immediately on receiving intelligence of the lofs. Not having done fo, he gives credit to the agent.

The meaning of the claufe in the policy which enables the infured to labour for the recovery of the goods without prejudice to the infurance.

(*a*) Mr. Juftice *Afhurft* and Mr. Juftice *Buller*.

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it is, that, till the insured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandoning: And this is reasonable, because the loss may happen at a great distance, so that the insured cannot exercise their judgment immediately: It is therefore necessary that the master, who is on the spot, should do the best he can. But the insured are bound to decide, and signify their election to the underwriters the first opportunity; for though the person who takes upon him to act on the occasion for the benefit of all concerned, is not the agent of the insured, yet if, upon receiving notice of the loss, they do not elect to abandon, they adopt the acts of such person, and make him their agent. This is something like the notice that is to be given to the drawer of a bill of exchange, in case of non-payment, which, if the holder omit to do, he is considered as giving credit to the acceptor, and therefore the loss, if any, must fall on him. There may be cases where the acts of the captain may not make him the agent of either party; and then he only acts in common for them both, till notice is received by the parties at home. If, after such notice, he be continued in the agency, he becomes the agent of the party by whom he is so confirmed: But he cannot be considered as the agent of the underwriters, till notiee has been given to them, and they have had an opportunity of exercising their discretion, whether they will or will not continue him; though, till notice of the loss was first received by the insured, the property continued at the risk of the underwriters. Here, *Cruden* for near three years was considered by the insured as their agent; credit was given to him in that character; frequent applications were made to him for payment; and, till his insolvency, there was no appearance of any intention to disown him: That was the first moment when the insured thought of abandoning.—Mr. Justice *Buller* said; —" It is true that the insured are not *bound* to abandon: On the contrary, all the cases have said that where they are entitled to abandon, they have the option to do so or not; but unless they do elect to abandon, it is only an

The insured is bound to decide and give notice of his decision the first opportunity.

If he neglect this, he adopts the acts of the agent.

If the captain be continued in the management after such notice to the underwriters, he becomes their agent.

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average loſs.—The only point to be conſidered is, whether this doctrine will be productive of any uncertainty: If it would, that would be a ſufficient reaſon, in a new caſe, for not adopting it. But, in my opinion, a contrary deciſion would be productive of infinite uncertainty; for it would leave open a very vague queſtion, namely, what time the inſured ſhould be allowed to abandon. If it can extend to three years, there is no reaſon why it ſhould not extend to a much longer period: But no uncertainty can follow from this determination; for our opinion is, that when the account of a loſs has reached the inſured, they muſt make their election whether they will abandon or not: If they do, they muſt give notice of their intention, to the underwriters, within a reaſonable time. If they act otherwiſe, they cannot be permitted, at any ſubſequent period to change a partial into a total loſs."

In the following caſe the above principles were adopted and enforced by Lord *Kenyon*; and, indeed, they have ever ſince been received and acted upon as clear law.

Allwood v. *Henkell*, at N. P. B R. after Mich. 1795 *Park* 172.

A recaptured ſhip is carried into a diſtant port, and there ſold for the benefit of all concerned; and the inſured give directions to the agent to have the proceeds remitted to them; but afterwards, and four months after they had notice of the loſs, they give notice of abandonment.—This is too late.

Goods were inſured, 'At and from *London* to *Jamaica*.'—The ſhip was taken by a *French* privateer within a few leagues of *Jamaica*. Part of the property inſured was taken out of the ſhip. The captain, boatſwain, and all but ſeven men, were alſo taken out of her. In a fortnight after, as the captors were proceeding to *America*, the ſhip, with the remainder of her cargo, was retaken by an *Engliſh* frigate, and ſent into *Antigua*; and both were ſold there under a decree of the vice-admiralty court, by a prize agent, who received the proceeds to be paid over to the concerned, deducting one eighth for ſalvage, according to the then late prize act (*a*). The capture and recapture were entered at *Lloyd's* on the 15th of *February* 1795; but it was not known whither the ſhip was carried till the 30th of *March*, when a letter was received at *Lloyd's*, addreſſed to the owners, freighters, and underwriters, from the judge of the vice-admiralty court at

(*a*) 33 G. III. c. 66.

Antigua, informing them of the arrival of the ship, and of the sale of the ship and cargo, under a decree of the court; and desiring to have some agent appointed to remit the proceeds to *England*. Powers of attorney were sent out in *April* by the insured, for this purpose, with orders to remit the proceeds to the banking-house of *Smith*, *Payne* and *Smith*, one of whom was agent to the insured. —It was objected on the part of the defendant, that although the insured as well as the *insurers* were informed of the loss in the beginning of *April*; yet the insured did not abandon till *August*, near four months after the power of attorney had been sent out to *Antigua*. To this it was answered that, the property having been absolutely sold, and converted into money, before the insured knew where the ship was taken to; the loss was total in its nature, and therefore there was no occasion to abandon.—Lord *Kenyon*, who tried the cause, inclined to think that an abandonment was necessary, and that the case was the same as if the property had not been sold, but remained in *specie* at *Antigua*. But he gave no decided opinion on this point. He said the insured were not bound to abandon in any case; and might, in case the sales had been very advantageous, have taken the benefit of them, in the same manner as they might have returned the property, if it had remained in specie. But the insured must make his election speedily, whether he will abandon or not, and put the underwriter in a situation to do what is necessary for the preservation of the property whether sold or unsold: "He cannot," said his lordship, "lie by, and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them." —There was a verdict for the plaintiff for a *partial loss*.

The insured must make his election speedily.

He must not first treat the loss as partial, and then abandon.

Anderson and another v. Roy. Ex. Assur. 7 *East*, 38

Wheat is insured from *Waterford* to *Liverpool*. The ship is

So, where a quantity of wheat was insured, from *Waterford* to *Liverpool*, '*free from all average unless general*, '*or otherwise specially agreed*.' The ship, on the 28th of *January*, in proceeding down the river, from *Waterford*, struck upon a rock and immediately filled with water; and

and to prevent her from sinking, she was run on shore, where she remained four weeks, with her hull under water at high water every tide, and could not be got off till her cargo was taken out. All the wheat was damaged; about two thirds of it were taken out, and kiln-dried at *Waterford*; part of the remainder was sold to feed hogs, and the residue thrown overboard as useless. The clear proceeds of the quantity saved amounted to 95l. 13s. 4d. which were remitted to the insured at *Liverpool*, who, on the 18th of *February* 1804, twenty-one days after the accident, gave notice of abandonment at *London*.—Upon this case there was a verdict for the plaintiff for a total loss, deducting the salvage.—Upon a motion for a new trial, the court expressed an opinion that, as there is a constant intercourse between *Waterford* and *Liverpool*, where the insured resided, the abandonment was too late (*a*).— But it appearing by affidavit that the insured received notice of the loss at *Liverpoool* on the 2d of *February*, and that this was communicated to the defendants on the 4th, with an offer to abandon, which they refused; and being now called upon to admit this as a fact in the case, they refused, upon which a new trial was granted.

stranded near *Waterford*. The insured reside at *Liverpool*, and the underwriters at *London*. Notice of abandonment three weeks after the accident is too late.

So, if a ship be insured for part of her value, and being captured, the insured demand as for a total loss, which the underwriters are willing to pay, on having an assignment of *one fourth* part of the ship from the owner, by way of abandonment; but the insured refuse this, because the one fourth of the ship is of greater value than the sum insured; and the insured, instead of abandoning, repurchased the ship from the enemy:—In this case, he is not entitled to recover as for a total loss, not having abandoned; nor can he recover the sum paid for the repurchase of the ship, that being an illegal contract, and not only a trading with the enemy,

If the underwriters demand an abandonment of more than they have insured, this need not prevent the insured from abandoning to the amount of the sum insured: But if he neglect this, he shall not afterwards recover as for a total loss.

(*a*) Lord *Ellenborough* said he rather conceived that it was the province of the judge to direct the jury, as to what is a reasonable time, under the circumstances.

but alſo a ranſom, within the meaning of the ranſom act.

Havelock v. Rockwood, 8 T. R. 268.

A *British* ſhip is captured, and carried into a neutral port, and there condemned by the enemy's conſul: If the inſured do not abandon, but repurchaſe the ſhip ſold under the ſentence, he ſhall not recover as for a total loſs: the property never having been out of him by the condemnation; nor ſhall he recover the ſum paid for the repurchaſe, that being a ranſom, and illegal.

Thus:—The ſhip *Themis* was inſured for twelve months, and ſailed on the 4th of *April* 1797, on a voyage from *Shields* to *Riga*; was captured on the 7th of *April* by a *French* privateer, and carried into *Bergen* in *Norway*, where, on the 17th of *April*, ſhe was condemned by a ſentence of the *French Conſul* there.—News of this being brought to *England* by the captain, the plaintiff demanded a total loſs from the underwriters, on which he received a letter from their broker, informing him that they were ready to ſettle with him, he firſt making an aſſignment of *one fourth* part of the ſhip to the broker for their benefit; and that if the plaintiff had any thoughts of repurchaſing the ſhip, the underwriters would have no objection to pay their *quota* of the price.—The ſum inſured not amounting to one fourth of the value of the ſhip (*a*), the plaintiff declined making the aſſignment.—There were frequent inſtances of this ſort of condemnation in the port of *Bergen* during this war, which were made with the knowledge of the *Daniſh* government, who received duties thereon, and on the ſales in conſequence of them. On the 13th of *July* 1798, the ſhip was ſold by public auction, by the officer appointed by the court of *Denmark* for ſuch ſales, and was puchaſed for the plaintiff, by his agent at *Bergen*, for the ſum of 1628 l. 8 s. 4 d., which was her fair value. The ſhip being then repaired, inſtead of proceeding to *Riga* ſailed to *Peterſburgh* and afterwards returned to *England*.—In an action upon this policy, the defendant paid 30 l. 11 s. 3 d. *per cent.* into court, and upon the trial there was a verdict for the plaintiff as for a *total loſs*, ſubject to the opinion of the court on a caſe which ſtated the above facts.—The queſtions for the opinion of the court were, 1ſt, Whether the plaintiff was entitled to recover as for a total loſs, or only

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(*a*) It does not appear, by the report of this caſe, whether the inſurance was upon *one fourth* of the ſhip, or that the ſum inſured amounted to what the underwriters deemed a fourth.

for

for a partial loſs. 2dly, If for a partial loſs only, then, whether the ſum paid for the purchaſe was to be included, in which caſe a nonſuit was to be entered.—It was contended on the part of the plaintiff, that he was entitled to recover as for a total loſs, on the ground that the ſhip was captured by an enemy, and condemned by a court of competent juriſdiction: But the court expreſſing a decided opinion that no *French* court of admiralty could legally be holden in *Denmark*, adopting the deciſion in our court of admiralty, in the caſe of the ſhip *Flad Oyen* (*a*), that point was abandoned as untenable.—It was then inſiſted, 1ſt, That when the ſhip was captured, the plaintiff had a right to abandon, and did in fact abandon; and 2dly, That at leaſt the plaintiff was entitled to recover as for a partial loſs, in which was to be included the ſum paid for the repurchaſe of the ſhip.—On the part of the defendant it was anſwered, 1ſt, That whatever right the inſured might have had to abandon at one time, he ought to have made his election to do ſo, immediately after the capture; but he refuſed to transfer his right to the inſurer, and therefore he could not ſay that he was ready to abandon; and, 2dly, That if this was only a partial loſs, the price paid for the repurchaſe of the ſhip ought not to be included in it, that being a void contract, not only by the ranſom act (*b*), but alſo by the common law, on the ground of its being a trading with the enemy.—The court determined that the plaintiff was not entitled to recover on either of theſe grounds.—They declined giving any opinion on the queſtion, whether the contract at *Bergen* was void, on the ground of its being a *trading with the enemy*, as that queſtion would ſhortly come before the court upon a writ of error, in the caſe of *Potts* v. *Bell* (*c*). The only queſtion then re-

(*a*) Vid. ſup. 389.—(*b*) Vid. ſup. 585.—(*c*) In that caſe it has ſince been determined, upon great conſideration, that any trading by a *Britiſh* ſubject with the enemy, without the King's licence, is illegal, and that a policy on goods bought from the enemy is void. Vid. ſup. 87.

When the purchase of a captured ship shall be deemed a ransom.

maining was that relative to the ransom. Upon this they were clearly of opinion, that the transaction above stated amounted to a ransom; that the money paid by the plaintiff to regain the possession of his ship was illegally paid; and consequently that it could not constitute a charge on the underwriter.

But if the insurers prevent the abandonment, they shall pay the whole loss.

But if, by any interference of the underwriters, the insured be actually prevented from abandoning, the underwriters are liable for all the loss sustained by the insured to the extent of the sum insured.

Da Costa v. Newnham, 2 T. R. 407.

A total loss having happened, the insured proposes to abandon, but is dissuaded from it by the underwriters, who order the ship to be repaired, but afterwards refuse to pay for the repairs, and the ship is, on this account, obliged to be sold — The insurers are liable for all the loss sustained, to the amount of the sum insured.

As, where a ship was insured 'from *Leghorn* to *London*, with liberty to touch at *Nice*.'—The ship met with an accident in the course of her voyage, and was obliged to put into *Nice* to repair. Advice of this was transmitted to the owner, who was informed that it would be necessary to unload, by which a considerable expence must be incurred. This he communicated to the underwiters, and expressed a desire to abandon. Some altercation arose; they insisted on the vessel's being repaired, and telling him to pay the bills. He at last consented to this; but refused to advance any money; in consequence of which it became necessary to take up a large sum on bottomry. The ship was refitted and resumed her voyage, and gained freight afterwards. Upon her arrival at *London*, application was made to the underwriters, to take up the bottomry bond, which they refused, and the vessel was obliged to be sold, to satisfy that debt, so that she never was in the possession of the insured again. The sum due upon the bottomry bond was 678 l., and the ship sold for 630 l.—Under these circumstances, Mr. Justice *Buller*, who tried the cause, was of opinion, and it was so agreed at the trial and not afterwards disputed, that there had not been a total loss at *Nice*; for though the plaintiff offered, and was entitled, to abandon, yet, in truth, he had not abandoned. This, therefore, was considered only as a partial loss.—But Mr. Justice *Buller*, at the trial, and the court afterwards, determined, that the underwriters were answerable for all the injury that had accrued to the owner in consequence of their interference, and directions, and their subsequent refusal to discharge the

the bottomry bond; that in consequence of this, the ship never came free to the owner's hands, but was obliged to be sold, and therefore the underwriters were liable to the amount of the insurance.

In a former chapter it was shewn that if no intelligence be received of a ship within a reasonable time, it shall be presumed that she foundered at sea (*a*). When the time has elapsed which affords that presumption, the insured may abandon and claim as for a total loss.

If the ship be not heard of in a reasonable time, the insured may abandon.

Sect. III.

Of the Form of the Abandonment.

IN the preceding section we have seen that, as soon as the insured is informed of a total loss, he must make his election whether he will abandon or not. If he determine to abandon, and demand as for a total loss, he is not obliged, as in some foreign countries, to make a formal protest (*b*), but merely to give notice of the loss to the underwriters, and of his determination to abandon.

Notice of abandonment.

It is singular that an abandonment is not made in any particular form, or accompanied by any of those solemnities which such an act would seem to require. In cases of importance, however, it is not unusual for the insured, upon payment of the loss, to make a formal assignment by deed to the underwriters, or to trustees for the use of all who may be concerned in the salvage. But, in whatever form an abandonment is declared, it must be explicit, and is not to be taken as matter of inference from an equivocal act.

There is no particular form of an abandonment.

Therefore, where a letter to the insured, stating that the ship had been forced on shore, and a quantity of sugars

Thelluson v. Fletcher, 1 Esp. Rep. 72, sup. 129.

The insured inform the underwriters that the ship has been stranded, and the goods damaged

(*a*) Vid. sup. ch. 12, s. 1. p. 488. *Emerig.* tom. 2, p. 181.—(*b*) Vid. *Pothier*, h. t. n. 126. *Emerig.* tom. 2, p. 190.

And the underwriters desire the insured to do the best they can with the goods; this will not turn a partial into a total loss.

sugars damaged, was shown by the broker to the underwriters; and they, by way of answer, desired, 'that the 'insured would do the best they could with the injured 'property;'—It was insisted that this letter amounted to an abandonment, and that the answer of the underwriters was an assent to it.—But Lord *Kenyon*, who tried the cause, said, that as this was but a partial loss, the insured could not, by their own act, turn it into a total one. That it was the interest of the underwriters, and the duty of the insured, to make a partial loss as light as possible; and that this was the meaning and import of the letter, and of the answer of the underwriters.

There must be some notice of it.

This notice of abandonment may be given, either to the underwriter himself, or to the agent who has subscribed for him. And this is necessary though the ship and cargo were sold and converted into money before the notice of the loss was received (*a*).

If the insurance be entire, the insured cannot abandon for part only.

In general, the abandonment ought to be made for the whole of the effects insured, and not for a particular part; as if part be rotten, the insured cannot abandon that part only and retain the rest, but he must abandon the whole or nothing; for the contract being entire, cannot be severed (*b*).—Thus, if I have divers sorts of goods on board a ship; as sugars, indigo, and cotton; and I insure 1000 l. on the whole, without any distinction; this insurance is entire, and I cannot abandon my sugars, and retain my indigo and cotton (*c*).

But if different articles be separately insured or separately valued any one may be abandoned.

But if I insure these articles by different policies; or if, in the same policy, they be separately valued, I may abandon any one article, and retain the rest; because these are, in effect, distinct insurances, though in the same policy (*d*).—So, if I insure a ship and cargo, distinguishing how much for the one, and how much for the other; and the ship in the course of the voyage be condemned,

(*a*) *Hodgson* v. *Blackiston*, at N. P. after Hil. 38 G. III. *Park* 172.— (*b*) Vid. *Valin* on art. 47, h. t. p. 102.—— (*c*) *Valin* ubi sup. *Pothier*, h. t. n. 131.—(*d*) *Valin*, ut sup. *Pothier*, n. 132.

as incapable of proceeding further; I may abandon for the ſhip, and not for the cargo (*a*). But if I inſure the ſhip and cargo *for one entire ſum*, and the ſhip be ſtranded, I cannot retain the goods, and abandon the ſhip (*b*).

The abandonment muſt be ſimple and unconditional; otherwiſe it will not transfer the entire property to the inſurers, which muſt at all events be done, for this is of the eſſence of the abandonment. If therefore I abandon a captured ſhip, on condition that, in caſe ſhe be releaſed, ſhe ſhall continue my property, and I ſhall repay with intereſt the ſum which the inſurers ſhall have paid me,—ſuch an abandoment would be void (*c*). It muſt be unconditional.

Sect. IV.

Of the Effect of an Abandonmeut.

BY the abandonment, the inſured, as we have already obſerved, yields up to the inſurers, all his right, title, and intereſt in the ſhip or goods inſured, or what may be ſaved of them, which, from the notice of abandonment, become the property of the inſurers (*d*). It operates as a transfer to them, in proportion to their reſpective ſubſcriptions, without any regard to the priority of the policies, if more than one (*e*); and though the ſhip or goods ſhould appear, by the ſeveral policies, to be over-inſured (*f*). And this transfer has a ſort of retroſpective relation in reference to the inſurers, who, to the extent of the ſum inſured, are preſumed to have been, from the beginning, owners of the things inſured (*g*), according to the rule of the *Roman* law, *Quod repudiatur, retro noſtrum non fuiſſe palam eſt* (*h*).

The abandonment transfers the property ſaved to the inſurers in proportion to their reſpective ſubſcriptions.

And it relates back to the commencement of the voyage.

(*a*) *Emerig.* tom. 2, p. 215.——(*b*) *Emerig.* tom. 2, p. 215.——(*c*) *Valin.* art. 60, p. 133, art. 47, p. 103. *Emerig* tom. 2, p. 194.——(*d*) Vid. *Le Guidon.* ch 7. art. 1.——(*e*) *Emerig* tom. 2, p. 194.——(*f*) Vid. ſup. ch. 4, § 4. p. 146.——(*g*) *Emerig.* tom. 2, p. 196.——(*h*) ff. lib. 38, tit. 5. *Si quid in fraudem.*

This

In France the abandonment of the ship transfers the freight she has earned.

This principle is carried so far by *the French* law, that, by the abandonment of a ship, the insurer becomes intitled to all the freight she may have earned, freight being deemed an incident inseparable from the ship. *Emerigon* even goes the length of saying, that it is inconsistent with the nature of the contract of insurance, that the owner should claim the freight of a ship, the value of which he has received from the insurer upon the abandonment. And he supports this opinion on the ground that in the course of the voyage the value of the ship must necessarily diminish in nearly the same proportion as the freight increases; and consequently, that the value of the ship and freight, at any given time in the voyage, is only equal to the original value of the ship, at the commencement of the voyage (*a*). But this notion could only have originated in the absurd supposition that a ship can earn no more freight, in any voyage, than is sufficient to reinstate her in the same condition she was in when she sailed on that voyage.

By the abandonment of the ship the insurer becomes the legal owner, is liable for all her outgoings, and entitled to all her future earnings.

By the abandonment of a ship, according to our law, as I understand it, the insurer becomes the legal assignee and owner, and from that time, he is liable for all her future outgoings, and consequently entitled to all her future earnings. While any profit can be derived to the insured from the future use of the ship, it cannot be deemed a total loss; and he can only exercise the right of abandoning, upon the presumption in law that the existing circumstances are equivalent to a total loss. Under such circumstances, the owner compels the insurer to purchase the hope of salvage, for the full value insured, and thereby puts him into his place for all chances favourable or otherwise. The chance of the ship's earning freight is one ground of the calculation made by the insured, when he decides whether or not he will abandon. The insured could not receive more, if the ship had been actually lost or destroyed, than he receives upon an abandonment; and, in such a case, he cannot be in a better situation than if such a loss had really happened: Nor is it reasonable that the insurer, who, besides paying the full

(*a*) Vid. Emerig. tom. 2, p. 221, vid. sup. ch. 3, § 6.

value

value of the ſhip, incurs the expence and riſk of all future contingencies, ſhould not be entitled to her future earnings.—After an abandonment of a ſhip, the underwriters are not bound to purſue the voyage contracted for, at their own riſk and expence, without any compenſation; for a contract of this nature is not like a mortgage which binds the land; but is perſonal, and only binds the owner who made it. And even ſuppoſing the previous contracts of the owners with the freighter would, in equity, after an abandonment, bind the underwriters to purſue the voyage, if practicable, the ſame equity would transfer to the latter the benefit, as well as the burthen, of thoſe contracts. Some voyages, ſuch as thoſe to the *Eaſt Indies*, may laſt two or three years. The ſhip may be ſtranded at the commencement of her outward voyage, and be in ſuch peril as to warrant an abandonment. If then, the owner, electing to abandon, receive payment from the underwriters on the ſhip, as for a total loſs, it cannot be contended that he would be entitled to the uſe of the ſhip for the remainder of the voyage.

The underwriters are not bound by the contracts of the inſured reſpecting freight, or the inſurance of it.

The underwriters upon the ſhip are not bound to take notice of any contract for freight, or the inſurance of it, to which they are no parties. They are not obliged to accept a qualified abandonment; and an unqualified abandonment muſt transfer to them the entire property, with all its incidents. There cannot, therefore, be an abandonment of the ſhip and freight to different ſets of underwriters. It is with good reaſon, therefore, that the laws of *France* and other countries conſider freight as ſo inſeparable in its nature, from the property of the ſhip, that they do not permit them to be ſeparately inſured (*a*); and the difficulties which aroſe in the following caſes ſufficiently ſhew the inconſiſtency, not to ſay the abſurdity, of the contrary practice, as permitted in this country.

If the ſhip and freight be ſeparately inſured, and each be abandoned; to whom freight ſubſequently earned ſhall belong.

If both ſhip and freight be inſured in the ſame policy, it can never be a queſtion to whom freight, earned after

(*a*) Vid. ſup. ch. 3. § 6.

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an abandonment, and payment of a total loſs, ſhall belong: But where the ſhip and freight are ſeparately inſured, and each is abandoned to the reſpective underwriters, it then becomes a queſtion to which ſet of underwriters freight earned afterwards ſhall belong.—In the following caſe that queſtion was much conſidered; but the court determined it upon the expreſs contract of the inſured, upon the abandonment, to aſſign all freight that might be recovered to the underwriters on freight. But it is not to be inferred from this, that it was the opinion of the court that the underwriters on the ſhip were not entitled to the freight: On the contrary, the court ſeems to have thought that the inſured was bound to account to them alſo for the freight earned by the ſhip, deducting the expences of proviſions, wages, &c.

Thompſon v. *Rowcroft*, 4 *Eaſt*, 34.

A ſhip and freight are ſeparately inſured, and the ſhip being laid under embargo in a foreign port, the owner abandons the ſhip and the freight to the reſpective underwriters, who pay a total loſs on each; the owner undertaking, in caſe the ſhip ſhould be reſtored, to aſſign the ſhip to the one ſet of underwriters, and the freight to the other. The ſhip is reſtored, and earns freight, which is paid to the owner.—Whatever may be the right of the underwriters on the ſhip to the freight thus earned, the inſured is bound by his expreſs contract to pay the freight ſo received to the underwriters on

In that caſe the defendant, having chartered the ſhip *Theſeus* to one *Saunders* for a voyage to *Riga*, to fetch a cargo of timber to *Portſmouth*, cauſed a policy to be effected on the *ſhip* from *Portſmouth* to *Riga* and back, for 2,400l and another upon the *freight* from *Riga* to *Portſmouth* for 1,400l.—After the ſhip arrived at *Riga*, an embargo was laid by the *Ruſſian* government on all *Britiſh* ſhips in that port; the captain and crew were marched up the country, and detained as priſoners from *November* 1800 till *May* 1801. Upon intelligence of theſe events arriving in *England*, the defendant abandoned, and received from the reſpective ſets of underwriters the amount of their reſpective ſubſcriptions as for a total loſs, and ſubſcribed an indorſement on the policy on the *ſhip*, dated 19th *January* 1801, undertaking 'to account to the 'underwriters for the ſhip, if reſtored to or recovered 'by them; or to make an aſſignment to them in propor-'tion to the ſums inſured.' He alſo ſubſcribed an indorſement on the policy on *freight*, dated the 11th of *February* 1801, ſtating, 'that the intereſt in the freight 'inſured, being abandoned to the underwriters to the 'extent of their ſubſcriptions, it was agreed to aſſign all 'right of recovery, compenſation, &c. &c. to certain 'perſons named, for the benefit of the underwriters and 'the inſured, according to their reſpective intereſts.'—The embargo being afterwards taken off, the ſhip was reſtored,

ſtored, and brought a cargo to *Portſmouth*, and the defendant received 1,857l. for freight.—The plaintiff, who was an underwriter on the policy on *freight* for 150l. called on the defendant to make an aſſignment of the freight, according to the indorſement on the policy on freight, or to pay him the 150l. and intereſt.—The underwriters on the ſhip inſiſted that they were entitled to the freight, and gave the defendant notice of this claim. —The argument of this caſe at firſt proceeded on the idea that the defendant was a mere ſtakeholder, and that the queſtion aroſe between the underwriters on the ſhip and thoſe on the freight, viz. which of them were entitled to the freight earned after the abandonment. But the queſtion was narrowed by the court to the conſideration of the ſpecific agreement between the plaintiff and defendant; and upon this ground alone the caſe was decided in favour of the plaintiff.—Lord *Ellenborough* ſeemed to be of opinion that if the queſtion had been, which of the two ſets of the underwriters were entitled to the freight earned by the ſhip after the abandonment, thoſe on the ſhip ought to have prevailed.—But the court were clearly of opinion that, in this caſe, the owner was bound by the terms of his contract, to pay the underwriters on the freight their proportion of the freight which he had received.—It was then ſuggeſted on behalf of the defendant that at leaſt he was entitled to deduct the expences of the voyage, ſuch as wages, proviſions, &c. which were in the nature of ſalvage on the freight.—But Lord *Ellenborough* ſaid,—"The defendant has received the entire freight, and therefore he muſt pay it over. The underwriters on the ſhip, from the time of the abandonment to them, ſtand in the ſame ſituation as the owner; and as the owner was liable to all theſe expences before, ſo, after the abandonment, they muſt be borne by the underwriters on the ſhip. Expences of this ſort are not, properly ſpeaking, ſalvage on the freight, but they are charges paid by the owner of the ſhip for the benefit of thoſe to whom he abandoned it; and therefore he will be entitled to retain a proportionable part on his ſettlement with them."[a]

freight. And he has no right to deduct the wages or other charges out of it.

Latham v. Terry, 3 *Bos. & Pul.* 479.

Same point decided.

In a subsequent case, circumstanced nearly the same as the above, the insured abandoned first to the underwriters on the ship, afterwards to those on freight, and undertook, upon payment of the loss, to assign to the underwriters on the *ship*, 'all their right and interest in 'the ship, in such manner as the committee for adjusting 'the loss might direct;' and to the underwriters on *freight*, 'all their right and title to all future benefit 'that might accrue thereafter, except as insurers therein.' —The court, conceiving that in this, as in the last case, the insured having bound themselves to account to the underwriters on freight, for all the freight they might receive, determined that they had made themselves responsible to the underwriters on freight for the freight they had received; they intimated, however, that the underwriters were to contribute proportionably to the expence of bringing the cargo home.—But, in giving judgment, they expressly declared that they did not mean to decide the question, as between the two sets of underwriters.

M'Carthy and others v. *Abel*, 5 *East*, 388.

Upon an hostile embargo, the insured abandons the ship and freight to the respective underwriters on each. The ship performs the voyage and earns freight, which is paid to the underwriters on the ship But, the ship having *earned freight*, the insured cannot recover against the underwriters on freight.

A third case, under circumstances nearly similar, has since been determined. It was an action brought by the owners of the ship *Thomas* against the underwriters in a policy on freight from *Riga* to *Plymouth*. There, the plaintiffs, upon receiving intelligence of the embargo, abandoned *their interest in the freight* to the underwriters thereon; and, at the same time, abandoned *the ship* to the underwriters on the ship, and assigned the ship to trustees for the use of the underwrirers thereon, they agreeing to pay a total loss. The master of the ship afterwards drew a bill on the agent of the underwriters on the ship for 718l. 3s. 6d. to pay for repairs at *Riga*; and, on his arrival at *Plymouth*, received from the agent of the freighters 500l. part of the freight, to pay seamen's wages and the charges of landing the cargo. The freight earned by the ship amounted to 2,242l. 6s. 10d. the balance of which, after deducting the 500l. was paid to the agent of the underwriters on the ship, under an indemnity against any claims which might be made, either by the owners of the ship, or the underwriters on freight.—On behalf of the plaintiffs it was argued, that the law of *England*,

England, in recognizing ſhip and freight as diſtinct ſubjects of inſurance, neceſſarily recognizes them as diſtinct ſubjects of abandonment; and therefore, as a ſimple inſurance of a ſhip does not cover freight, ſo an abandonment of the former muſt be always underſtood with an implied reſervation of the latter. That the freight which has been earned and paid cannot, as between theſe parties, deſtroy the right of action which accrued to the inſured upon the abandonment; but that, at moſt, it was only ſo much ſalvage for the benefit of the underwriters on freight, which they were entitled to recover from the freighters.—But the court determined in favour of the defendant.—Lord *Ellenborough*, in delivering the judgment of the court, did not expreſs any opinion upon the queſtion, whether a title to the freight paſſed by the aſſignment of the ſhip, but merely ſaid that the ſhip having earned freight, no loſs could properly be demandable againſt the underwriters on freight; and that, if the freight could, in any other ſenſe, be conſidered as loſt to the inſured, it became ſo, not by any of the perils inſured againſt, but by an abandonment of the ſhip, which was the act of the inſured themſelves, with which the underwriters on freight had no concern.

In a ſtill more recent caſe, where the facts were nearly ſimilar, the inſured abandoned, firſt, the ſhip, and afterwards the freight, to the reſpective underwriters on each, who accordingly paid a total loſs on each. The ſhip, which was a *ſeeking*, and not a chartered, ſhip, earned 1,900l. freight on her homeward voyage, which was paid to the inſured. In an action brought by one of the underwriters on *freight*, for his proportion of this ſum, as money received by the inſured to his uſe, it ſeems to have been aſſumed, that the underwriters on freight were entitled to the benefit of ſalvage, and therefore entitled to the freight received by the inſured, deducting the expences to which freight is liable; and the principal queſtion was, what thoſe expences ought to be.—The court determined that the following expences incurred in proſecuting the adventure might be deducted from the ſalvage on the ſhip and freight, in proportion to their

Sharp v. Gladſtone, 7 Eaſt, 24.

In a ſimilar caſe, the freight received by the owner is payable to the underwriters on freight, ſubject to a deduction of a proportion of the charges incurred in proſecuting the voyage.

2 reſpective

respective values. 1. The expence of the ship and crew in the foreign port, including port charges, beside the expence of shipping the cargo, which exclusively falls on the underwriters on freight; 2. Insurance thereon; 3. Wages of the crew during their detention; 4. The wages and provisions of the crew, from their liberation in the foreign port till their discharge at home: But, that the insured was not entitled to deduct, 1. The charges paid at the port of discharge on the ship and cargo; 2. Insurance on the ship; 3. Diminution of the value of the ship and tackle, by wear and tear, on the voyage home.—Lord *Ellenborough*, in the course of the argument, took an opportunity of observing that, after an abandonment of the ship to the underwriters on the ship, he had great difficulty in saying that the insured could abandon the freight, which seemed to follow the property in the ship, being the earnings made by the subsequent use of that which was then become the property of others, to another set of underwriters; and, as a general question, he desired to be understood as giving no opinion upon it.

Where the insurance is for less than the value of the thing insured, the abandonment is in the same proportion.

Where the interest of the insured is not entirely covered by the insurance, he may abandon to the extent of the sum insured; for he is his own insurer for the residue.—Thus, if goods of the value of 5,000l. be insured only to the amount of 4,000l. and a total loss happen, the insured shall only abandon four fifths of what is saved; the remaining fifth will belong to himself (*a*); and he will be tenant in common, for that fifth, with the insurers.—The same rule holds where the cargo, by a new purchase during the voyage, is augmented in quantity.

If goods be partly insured, and money borrowed on respondentia for the residue; the insurer, will have the legal title to what is abandoned, and the lender an *equitable claim* for his proportion.

So, where goods are only partly insured, and the owner has borrowed money on respondentia to the value of the residue; if he abandon, the insurer and the lender have a joint claim to what is saved, in proportion to their respective interests. But by the abandonment, the insurer is put in the place of the insured, and has the *legal title*

(*a*) *Emerig*, tom. 2, p. 215, 237. *Valin*. sur. art. 47, h. t. p. 106.

to the effects saved, and the lender only an *equitable claim* to his proportion (*a*).

In *France* the claim of the lender is preferred to that of the insurer.

Yet, by the law of *France* (*b*), the claim of the lender, in such case, shall be preferred to that of the insurer, to the extent of his capital.—The reason of this preference is, that the lender contributes directly to the procuring of the goods; whereas the insurer is only a surety to protect the adventurer from the risk, without furnishing the thing put in risk. The lender has a substantial interest in the goods, and being in nature of a pawnee, has a sort of *lien* on them, which cannot be discharged by the transfer which the abandonment operates to the insurer. This only puts the insurer in the place of the insured; but the creditor and debtor can never have concurrent rights (*c*). *Emerigon* even goes so far as to say that the lender's claim ought to be preferred, even for the marine interest.—*Valin* (*d*) holds a contrary opinion, and argues to refute this reasoning contained in a letter which he had received from *Emerigon* on this subject. *Emerigon*, however, in his book, supports his former opinion, and triumphs in its being sanctioned by the approbation of *Pothier* (*e*).

If there be three policies, one on the ship and cargo, one on the ship only, and one on the cargo only; how, in case of abandonment, the claims of the different sets of insurers shall be adjusted.

If there be three insurances; one on the *ship and cargo*; one on the *ship* only; and one on the *cargo* only; *Emerigon* (*f*) thinks that insurers on the ship and cargo have an equal claim on the effects saved, with the insurers on the cargo only, and that they have a like claim on the freight, and the remains of the ship, with the insurers on the *ship only*, in proportion to their respective subscriptions.—For example: If a ship be valued at 5,000l., the cargo 5,000l., total 10,000 l.; and these are insured by different policies, thus;

(*a*) Vid. *Emerig.* t. 2. p. 234.——(*b*) Ord. mar. tit. *contrats à la grosse*, art. 18.——(*c*) *Emerig.* tom. 2, p 234, 235.——(*d*) *Valin*, tit. *contrats à la grosse*, art. 18.——(*e*) *Pothier*, *contrats à la grosse*, n. 49.——(*f*) Tom. 2, p. 240.

	£
On ſhip and cargo - - -	3,000
On the ſhip only - - -	3,000
On the cargo only - - -	3,000
Uninſured - - - -	1,000
	10,000

A ſhipwreck happens, and the net proceeds of the wreck of the ſhip are 500l., and of the cargo 500l.; total 1,000l. *Emerigon* would adjuſt the claims of all parties thus:

	£
To the owners for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of the produce of the wreck, - -	225
The like to the inſurers on the ſhip, - -	225
To the inſurers on the cargo, a moiety of the produce of the goods ſaved, - -	225
The like to the inſurers on the ſhip and cargo,	225
	1,000

By this adjuſtment the inſurers on the ſhip and cargo would have a double ſhare of the effects abandoned, which is manifeſtly unjuſt.—An *Engliſh* merchant would, I conceive, adjuſt the different claims thus:

	£
To the owners, for their part of ſhip and cargo uninſured, - - - -	100
To the inſurers on ſhip and cargo, a moiety of three-fifths of the produce of the wreck, -	150
To the inſurers on the ſhip, three-fifths of the produce of the wreck, - - -	300
To the inſurers on the cargo, three-fifths of the produce of the goods ſaved, - -	300
To the inſurers on the ſhip and cargo, a moiety of three-fifths of the produce of the goods ſaved, - - - -	150
	1,000

The

The abandonment does not only entitle the underwriters to all that can be saved of the effects insured; but if compensation be made to the insured for the injury from which the loss arose, this compensation shall go to the underwriters; for when they have paid the loss, they, and not the insured, are the real sufferers.—This will appear by the following case:

If, after the loss is paid, compensation be made to the owner, this shall go to the insurer.

The King granted letters of reprisal against the *Spaniards*, for the benefit of his subjects, in consideration of the losses they had sustained by unjust captures. The commissioners appointed to distribute the produce of these reprisals among the sufferers, would not permit the *insurers*, but the *owners only*, to make claim to the parts of the prizes allotted to the sufferers, although the owners were already satisfied for their loss by the insurers, who thereupon brought their bill in *Chancery*.—Lord *Hardwicke*, C. decreed in favour of the insurers.—He said;—"The person originally sustaining the loss was the owner; but, after satisfaction made to him, the *insurer*. No doubt but, from that time, as to the goods themselves, if restored *in specie*, or compensation made for them, the insured stood as a trustee for the insurer, in proportion to what he paid; although the commissioners did right to avoid being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made."

Randal v. *Cockran*, in Chan. 1748. 1 *Vez.* 98.

Reprisals being made on the *Spaniards* to indemnify the sufferers by unjust captures; the insurers, who have paid the owners the losses sustained by those captures, shall stand in their place, and receive their proportion.

If, upon a total loss happening, the ship be abandoned, but she afterwards arrive safe; this shall not avoid the abondonment. On the one hand, the insurers shall take to their own use all the profit of the voyage; and the insured is entitled to nothing, except for so much as he was uninsured (*a*). On the other, they shall not, on account of the safe arrival of the ship, refuse to

If the ship, after abandonment, arrive safe, the insurer shall have all the profit of the voyage.

(*a*) *Le Guidon*, ch. 7, art. 12.

pay the sum insured.—As if, upon a capture, the insured abandon, and the ship be afterwards released, or otherwise recover her liberty; the insurers shall nevertheless satisfy the insured as for a total loss: But then they are entitled to all the benefit of the voyage (*a*).

But they cannot compel the insured to take back the thing insured, and refund the money.

So, if the ship or goods insured happen to be recovered undamaged, after the insurer has paid a total loss; the following case will shew that he cannot compel the insured to refund the money, and take back the ship or goods; but the insurer shall stand in his place, and shall have the benefit of salvage.

Da Costa v. *Frith*, 4 *Bur.* 1966, sup. 132.

A total loss is paid on a quantity of bullion, which is afterwards recovered: The insurer cannot recover back more than his proportion of the value of it, after deducting the expence of salvage.

An insurance was made, 'Upon any of the packet-'boats that should sail from *Lisbon* to *Falmouth*, for 'one year, upon any kind of goods; such goods to be 'valued at the sum insured on the packet-boat, with-'out further proof of interest than the policy; and to 'make no return of premium for want of interest, be-'ing on bullion or goods.'—The defendant, who was one of the insured, had an interest in bullion on board the *Hanover* packet, on a voyage from *Lisbon* to *Falmouth*. The ship was totally lost off *Falmouth*; and the loss was adjusted at 100l. *per cent.*; but by a memorandum on the policy, the insured agreed that,—'*Should any* '*salvage* thereafter be recovered, he would refund to 'the insurers, *whatever he might so recover*, in such propor-'tion as the sum insured bore to the whole interest'; and the insurer accordingly paid the whole sum insured. —An iron trunk, which contained all the bullion, was afterwards fished up, and the bullion recovered, without any loss or prejudice whatever, and delivered to the insurer. The expence of salvage amounted to 63l. 8d. 2d. —The insurer, upon this, brought an action against the insured for money had and received, to recover back the amount of his subscription. The defendant (the insured) paid into court 48l. 4s., being the plaintiff's proportion of the value of the bullion recovered, after deducting the expence of salvage.—On the part of the plaintiff (the insurer)

(*a*) *Emerig.* tom. 2, p. 197.

insurer) it was contended that by the recovery of the bullion, the contract was performed on the part of the insurers; that the loss could only be considered as a partial loss, viz. the amount of the salvage; and that the agreement to allow the insurer in the proportion of the sum insured to the whole interest, made no difference. —But the court were unanimously of opinion that the insurer was not entitled to recover back the money he had paid to the insured, but only his proportion of the value of the goods saved, after deducting the expence of salvage, which was the sum paid into court.

An abandonment once properly made, upon a sufficient ground, and acccepted by the insurers, is absolute and binding upon both parties; nor can it be revoked but by mutual consent (*a*). *Emerigon* says, that if a ship, by reason of sea damage, be condemned as incapable of proceeding on her voyage, and the insured abandon; but the ship, being refitted, is brought home at the expence of the insurers; the insurers cannot compel the insured to take her back, but must pay the total loss (*b*) —*Valin* holds a contrary opinion, and says that if the insurers have not voluntarily paid the sum insured, they may, in such case, oblige the insured to take back the ship; the only question between them being, as to the amount of the partial loss (*c*). The opinion of *Emerigon* seems to be founded on the better reasoning.

An abandonment once properly made is irrevocable.

But the abandonment is irrevocable only where it is made upon a sufficient ground: And, therefore, if it appear to have been made upon a partial, and not a total loss; or upon information that proves false or unfounded, it will be void *ipso jure*. *Nam recte revocari, rescindi, et retrahi dicitur, quod ipso jure nullum est* (*d*).

But if it be not upon a sufficient ground, it will be void.

(*a*) *Pothier*, h. t. n. 138. *Emerig.* tom. 2. p. 197.——(*b*) *Emerig.* tom. 2, p. 195.——(*c*) *Valin*, on art 60. h. t. p. 144.——(*d*) Vid. *Emerig.* tom. 2, p. 197.

Sect. V.

Of the ordering and disposal of the Effects abandoned.

In case of misfortune, the insured is bound to use his endeavours to save as much as possible.

IN case of shipwreck or other misfortune, the effects that are saved continue, till abandonment, the property of the insured, who is bound in justice, honour, and conscience, to use his utmost endeavours to make the most of what may be rescued from destruction, in order, as much as possible, to lighten the burthen of the insurers. To enable him to do this, without prejudice to his right of abandonment, our policies provide that,—' in ' case of any loss or misfortune, the insured, their fac- ' tors, servants, and assigns, shall be at liberty to sue, ' and labour about the defence, safeguard, and recovery ' of the goods and merchandizes and ship, &c. with- ' out prejudice to the insurance; *to the charges whereof,* ' *the insurers agree to contribute, each according to the rate and* ' *quantity of his subscription.*' The meaning of this clause is, that, till the insured has been informed of what has happened, no act of the captain shall prejudice their right to abandon (*a*). There is a similar provision in the policies of all other commercial countries, with a similar undertaking on the part of the underwriters, to defray all expences, without limit, except in the policy used at *Marseilles*, in which the insurers only undertake to defray all expences occasioned by the salvage, *provided they do not exceed the value of the effects saved;* a precaution as *Emerigon* observes, which prevents their being ever liable for more than the sum insured (*b*). This accords with the sentiments of *Cleirac*, who says that the expences of the recovery of the effects saved, ought not to increase the loss

(*a*) Per *Ashurst*, J. in *Mitchell* v. *Edie*, sup. 590.——(*b*) Vid. *Emerig.* tom. 2, p. 205.

beyond

beyond the sum insured (*a*). But this restriction has occasioned many inconveniences both to the insured and insurers (*b*), which is the reason, perhaps, why it has not been adopted in any other place that I know of.

Duty of the captain in the care of what may be saved.

As to the captain, the ship and cargo being confided to his care, it is peculiarly his duty, in order that he may shew himself worthy of so great a trust, to employ all his courage, skill, and industry, in the protection and preservation of the one and the other.

His power.

From the nature of his situation, he has an implied authority, not only from the insured, but also from the insurers and all others interested in the ship or cargo, in case of misfortune, to do whatever he thinks most conducive to the general interest of all concerned; and they are all bound by his acts (*c*). Therefore, if the ship be disabled by stress of weather, or any other peril of the sea, the captain may hire another vessel for the transport of the goods to their port of destination, if he think it for the interest of all concerned that he should do so. Or he may, upon a capture, appeal against a sentence of condemnation, or carry on any other proceedings for the recovery of the ship and cargo, provided he has a probable ground for doing so. Or, he may, upon the loss of the ship, invest the produce of the goods saved in other goods, which he may ship for his original port of destination; and this, according to the doctrine of Lord *Mansfield* and Mr. Justice *Buller*, in the case of *Plantamour* v. *Staples* (*d*), shall bind the insurers. For whatever is recovered of the effects insured, the captain is accountable to the insurers. If the insured neglect to abandon when he has it in his power to do so, he adopts the acts of the captain, and he is bound by them. If, on the other hand, the insurers, after notice of abandonment, suffer the captain to continue in the management, he becomes their agent, and they are bound by his acts (*e*).

When agent of either party.

(*a*) *Cleirac* sur *Le Guidon*, ch. 20, art. 9.——(*b*) Vid. *Emerig.* tom. 2, p. 205,——(*c*) Per Lord *Mansfield* in *Mills* v. *Fletcher*, sup. 578.——(*d*) Vid. c. 5, § 2, sup. 170.——(*e*) Per *Ashurst*, J. in *Mitchell* v. *Edie* sup. 590.

Duty of the sailors.

As to the *sailors*,—when a misfortune happens, they are bound to save and preserve the merchandize to the best of their power; and while they are so employed, they are entitled to wages, so far, at least, as what is saved will allow: But if they refuse to assist in this, they shall have neither wages nor reward. In this the *Rhodian* law (*a*), and the laws or *Oleron* (*b*), of *Wisbuy* (*c*), and of the *Hans Towns* (*d*), all agree.

(*a*) ff. *de leg. Rhod.* art. 3.——(*b*) Art. 3.— (*c*) Art. 15. ——(*d*) Art 44.

CHAP. XIV.

Of the Adjustment of Losses.

THE adjuſtment of a loſs is the ſettling and aſcertaining the amount of the indemnity which the inſured, after all proper allowances and deductions have been made, is entitled to receive, and the proportion of this, which each underwriter is liable to pay, under the policy. To aſcertain, with due preciſion, the amount of a loſs, is ſometimes a work of conſiderable difficulty: And though this is generally performed, without litigation, by perſons converſant with this branch of buſineſs, queſtions ſometimes ariſe, upon which the moſt experienced merchants cannot agree, and then the law muſt draw the line between them.

By the law of *England*, as it now ſtands, as well as by the general law of merchants, the contract of inſurance ought not to be lucrative to the inſured, nor enable him to make a profit out of the loſs of another. It ought to afford him an indemnity, and no more (*a*). The inſurer ought never to pay leſs, nor the inſured receive more, than that which a fair indemnity demands. And this ſhould be aſcertained, not upon ſubtilties and niceties, but upon plain and eaſy rules, the dictates of common ſenſe, drawn from the truth of the caſe.

In adjuſting a loſs, the firſt thing to be conſidered is, how the *quantity of the damage* for which the underwriters are liable, ſhall be aſcertained. This being known, the next, and generally the moſt difficult, point to be ſettled, is, by what rule this ſhall be *appreciated*. When theſe things are ſatisfactorily aſcertained, the adjuſtment is

(*a*) Vid. *Le Guidon*, ch. 2, art. 12. *Emerig*. tom. 1. p. 259.

uſually

uſually indorſed on the policy and ſigned by the underwriters. We will therefore conſider,

I. *How the quantity of damage ſhall be aſcertained;*
II. *How the loſs ſhall be appreciated;*
III. *What ſhall be the effect of an adjuſtment.*

Sect. I.

How the Quantity of Damage ſhall be aſcertained.

WHEN a loſs has happened, and it appears, under all the circumſtances, to be a total loſs, and the inſured decides to abandon, he muſt give notice of this to the underwriters in a reaſonable time, otherwiſe, as we have already ſeen (*a*), he will wave his right to abandon, and muſt be content to claim only as for a partial loſs.

When the policy is a valued one, and the loſs total.

When the loſs is admitted to be total, and the policy is a *valued* one, the inſured is entitled to receive the whole ſum inſured, ſubject to ſuch deductions as may have been agreed by the policy to be made in caſe of loſs. For the inſured, by allowing the value to be inſerted in the policy, agrees that it ſhall be taken as there ſtated; and it is the ſame as if he had admitted it at the trial of the cauſe (*b*).

Difference between the adjuſtment of an open and a valued policy.

It is only in the caſe of a total loſs that there is any difference between an open and a valued policy. Upon the latter, the value is admitted, and the inſured has only to prove, if the inſurance was on goods, that the goods valued were on board. Upon an open policy, it is not only neceſſary to ſhew that the goods were on board, but alſo to prove the *value* of them; which value, not exceeding the ſum inſured, is the ſum the inſurers are bound to pay.

But in the caſe of a *partial loſs*, the like inquiry is to be made into the amount of the loſs, whether the policy

(*a*) Sup. ch. 13, § 2.——(*b*) Vid. ſup. 287, 8.

be of the one sort or of the other (*a*). The indemnity secured by either sort of policy is, that if the thing insured do not come safe to the port of destination, but is lessened in value by damage received in the voyage from any of the perils insured against, the loss shall be borne by the insurer.

When the loss consists in the *total loss* of one entire individual, parcel of the goods insured, and this is capable of a several and distinct valuation; as if, out of 100 hogsheads of sugar, ten happen to be lost, and the rest arrive safe; the insurer must pay the value of the ten (*b*).

Rule where the loss consists of one entire individual.

When a part of the goods insured is saved, and this exceeds the amount of the freight, the practice is to deduct the freight from the salvage, or goods saved, and to make up the loss upon the difference. But where the freight exceeds the salvage, then it is a total loss (*c*).

When part of the goods is saved.

But where the goods insured are damaged in the whole or in part, it becomes necessary to ascertain the *quantity* of such damage, which is done by taking the value of the goods, in their damaged state, from the prime cost, and the remainder will be the amount of the loss.

Where all the goods are damaged.

If several articles be insured for one entire sum, but with a distinct valuation to each, and only one be put in risk: If that one be lost, the insured shall recover such a proportion of the sum insured, as the value of that article bore to the value of the whole.

Where several articles are insured, and only one put in risk.

As, where the plaintiff wrote from *St. Kitts* to his agent in *London*, desiring him to make insurance on a ship and cargo to the amount of 5,500 l. valuing the ship at 1500l. Only 600 l. could be effected. No part of the cargo was ever put on board, so that in fact the policy attached only on the ship.—The ship being lost, and an action brought on the policy, the above rule was contended for on the part of the defendant.—Lord *Kenyon*, who tried

Amery v. *Rogers*, 1 *Esp.* Rep. 207

(*a*) 2 *Bur.* 1171. Vid. sup. 288.——(*b*) 2 *Bur.* 1170.——(*c*) Vid. *Boyfield* v. *Brown*, sup. 587.

the

the cause, seemed to be of opinion that, as the whole sum insured was less than the value of the ship, the plaintiff was entitled to the whole.—But the jury having intimated that the rule, as laid down by the defendant's counsel, was that which prevailed in such cases at *Lloyd's* coffee house, his lordship assented to their giving a verdict for such a proportion of the sum insured as the value of the ship bore to the value of both ship and cargo.

When there is a clause to be free of average under so much *per cent.* how that proportion shall be ascertained.

If there be a clause in the policy, to be free of average from a particular risk under so much *per cent.* and a loss occasioned by that risk take place; the proportion which the loss bears to the cargo, must be calculated upon the cargo which was on board when the loss happened, not upon that which was on board at any other time.

Rhd v. *Parr*, 1 *Esp.* Rep. 444, Sup. 492.

Thus:—In a policy on a slave ship, there was a memorandum, to be free of average under 5 *per cent.* for loss by insurrection of the slaves.—An insurrection took place when there were only 49 slaves on board. Seven of these were killed.—As this loss must amount to 5 *per cent.* to make the underwriters liable, it became a question, at what time the proportion which the loss bore to the cargo should be taken;—whether at the time when the insurrection took place, and the loss happened, or when the whole cargo was on board. Upon examination of persons acquainted with the practice in such cases, it was found that the time when the calculation was to be made, was, *when the loss happened*, at which time, the proportion of the loss to the cargo *then on board*, was to regulate the loss to be borne by the underwriters.

Sect. II.

How the Loss shall be appreciated.

What shall be deemed the true price of a thing.

THE true price of a thing is that for which things of the like nature and quality are usually sold in the place where they are situated, if real property; or in the place where they are exposed to sale, if personal (*a*).

(*a*) *Pothier, Des Ventes*, n. 242.

The first price is not always the true value.

The first price of a thing does not always afford a sure criterion to ascertain its true value. It may have been bought very dear, or very cheap. The circumstances of time and place cause a continual variation in the price of things. For this reason, in cases of general average, the things saved contribute, not according to the prime cost, but according to the price for which they may be sold at the time of settling the average. *Non quanti emptæ sunt, sed quanti veniri possunt*, is the rule of the *Rhodian* law (*a*). The same is adopted in the laws of *Wisbuy* (*b*).

Averages are settled according to the price at the time of settling.

Different modes of appreciating a loss.

Upon the subject of the valuation of the goods insured there has always been a great diversity of opinion, not only among speculative writers, but also among merchants themselves. Some contending for the prime cost, others for the current price at the time of the loss; some insisting on the price at the time and place where the goods are shipped, others on the price at the port of discharge (*c*).

How the valuation is made in France.

In *France*, where almost all policies are valued, the insured has his election to fix the previous valuation, either at the prime cost, or at the current price at the time and place of loading. If the goods be of the growth or manufacture of the insured, the latter valuation is always adopted (*d*). The same rule that applies to goods, applies also to the ship, which is always valued at the sum she is worth at the time of her departure (*e*), or at least at the commencement of the risk.—If goods, by being brought *from a distance*, are augmented in value, they may be estimated at their improved value, and an invoice made accordingly; nor shall the insured be obliged to produce his original accounts, having a right to insure the profit already acquired; and the insurer must either abide by the invoice made by the insured, or require a valuation by

Goods brought from a distance may be valued at their improved price.

(*a*) ff *de leg. Rhod.* l. 2, § 4.——(*b*) Laws of *Wisb.* art. 20. and 39. Vid. *Santerna*, h. t. par. 3, n. 40. *Roccus*, n. 31.——(*c*) Vid. *Emerig.* tom. 1, p. 261.——(*d*) Vid *Ord. de la mar.* h. t. art. 64, and *Valin* on this art. *Emerig.* tom. 1, p. 262.——(*e*) Vid. *Emerig* tom. 1 p. 263.

skilful persons according to the *current prices of the time and place.*—It is usual in *France* to stipulate in the policy that the ship shall remain of the same value during the voyage; which is the reason why *Valin* (*a*) says, that where the ship is abandoned, the *freight*, which augments in the same degree as the ship is deteriorated in value, is also abandoned, as being an inseparable incident to the ship (*b*).

In *England* the proper value consists of the prime cost and all charges.

In *England*, if the policy be an open one, it is an invariable rule to estimate a total loss, not by any supposed price which the goods might have been deemed worth, at the time of the loss, or for which they might have been sold, had they reached the market for which they were destined; but according to the *prime cost*, that is, the invoice price, and all duties and expences incurred till they are put on board, together with the premium of insurance. This is the only true, at least the only legal, mode of estimating a loss, whether total or partial, on goods; and, therefore, whether the goods would have arrived at a good or a bad market is always immaterial (*c*). Neither is the difference of exchange to be at all regarded in the adjustment; for the underwriter does not insure against any loss arising from such causes (*d*).

The value is never affected by the rise or fall of the market, or the course of exchange.

It might, with some degree of plausibility, be insisted that the prime cost, after a long voyage, and when the goods insured had almost reached a market where they would have sold for a great profit, does not amount to an *indemnity*; for, beside the loss of the profit the merchant might reasonably have expected, he also loses all the benefit he could have derived, from the use of his money in any other adventure. Upon this principle the *Consolato del mare* (*e*), in laying down rules for average contributions, declares that if the goods be lost before half the voyage is performed, they are to be valued only at prime

(*a*) On art. 8. and 64, h. t. p. 56, 136.—— (*b*) Vid. sup. ch. 13, § 4.——(*c*) Per *Buller*, J. at N. P. in *Dick* v. *Allen*, after Mich. 1785, *Park* 104.——(*d*) Per Lord *Kenyon* in *Thellusson* v. *Bewick*, at N. P. 1 *Esp.* Rep. 77.——(*e*) Ch. 95.

cost; but, if after, then at the price at which they might have been sold at the port of delivery.—However reasonable this rule may be, abstractedly considered, and as applied to average contributions, it would be more than counter-balanced by the litigation it would occasion, to decide, in questions of insurance, whether the voyage was half performed; or, if that were indisputable, then, what was the market price at the port of delivery. But, be this as it may, it is the invariable rule in this country, upon an open policy to estimate a total loss upon goods, by adding to the prime cost, all duties and expences and the premium of insurance; for this has constantly been deemed a full indemnity to the insured.

How a ship shall be valued.

A ship is valued at the sum she is worth, at the time she sails on the voyage insured, including the expences of repairs, the value of her furniture, provisions and stores, the money advanced to the sailors, and, in general, every expence of the out-fit; to which is added the premium of insurance (*a*).

When goods are damaged in the course of the voyage, the amount of the loss is that proportion of the prime cost which the price of the damaged bears to the price of the sound in the port of delivery.

A partial loss upon either ship or goods, is that proportion of the prime cost, which is equal to the diminution in value occasioned by the damage.—In the case of a partial loss upon goods damaged in the course of the voyage, much doubt has arisen as to the rule or measure by which the damage ought to be appreciated. Where the goods have come to a good market, it has been contended that the insured is intitled to *the difference between the price for which the damaged and undamaged goods have been sold at the port of delivery*; and that, where the goods have come to a fallen market, the insured ought to receive *the difference between the price of the damaged goods, at the port of delivery, and the prime cost or value in the policy*, But this would necessarily involve the underwriter in the rise or fall

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(*a*) By *Ord. de la mar.* h. t. art. 20, the premium cannot be added to the other charges, yet the allowance of it is supported by the authority of *Le Guidon*, ch. 2, art. 9, ch. 15, art. 3, 13, 15, and the practice of all commercial nations.

fall of the market. Besides, the difference between the price of the sound and damaged goods, in a risen market, might amount to more than the invoice price. For instance; suppose the prime cost of a quantity of goods to be 200l., which, coming sound to the port of delivery, would sell for 300l., but, being damaged, would sell for only 50l.; the difference would be 250; which is more than the prime cost. The true rule is, that the insured is only intitled to *that proportion of the prime cost which the price of the damaged bears to the price of the sound at the port of delivery*; thus, using the relative prices of the damaged and sound commodity, at the port of delivery, as a criterion to ascertain the proportion of the prime cost which the underwriter is bound to pay.—As, if goods, valued at 100l., and coming to a *good market*, would, if sound, have been sold for 120 l.; but are so damaged as not to fetch more than 40 l.: Then, according to the above rule contended for by the insured, the loss would be 80 l. *per cent*: But, according to the rule now established, the loss would be that proportion of the prime cost (100l.) which the difference between the price of the damaged and the price of the sound goods (80l.) bears to the price of the sound (120l.): Thus:—If 120l : 80l :: 100l. :—the answer is 66l. 13s. 4d., the true loss.—But, if the damaged goods had come to a *fallen market*, and had fetched only 30 l. and these, if sound, would have been worth 90l.; the insured, according to the above exploded rule, could claim only 60l. *per cent.*; but, according to the true rule, he would be entitled to that proportion of 100l. which 60l. bears to 90l., namely 66l. 13s. 4d.—This will be found fully exemplified in the following case.

Lewis v. *Rucker*, 2 *Bur.* 1167.

Sugars *valued* at 30 l. *per* hogshead are so damaged in the voyage, that they are sold at the port of delivery, for 20l. 0s. 8d. *per* hogshead, but, if sound, would

An insurance was made upon goods, 'At and from 'the island of *St. Thomas* to *Hamburgh*, from the loading 'at that island, till the ship should arrive and land the 'goods at *Hamburgh*.'—The goods which consisted of sugars, coffee, and indigo were valued; the clayed sugars at 30 l. per hogshead, *Muscovado* at 20 l.; and the coffee and indigo were also valued. Sugars were, as usual, warranted free from average under 5 l. *per cent.* and all other

other goods under 3 l. *per cent.* unless general, or the ship should be stranded.—In the voyage the sea water got in; and when the ship arrived at *Hamburgh*, it appeared that every hogshead of sugar was damaged; so that it became necessary to sell them immediately at *Hamburgh*: And the difference between the price they sold for, and what they would have fetched there, had they been sound, was as 20l. 0 s. 8 d. per hogshead, is to 23 l. 7 s. 8 d. That is, they were sold for 3 l. 7s. per hogshead less than they would have been worth, had they been sound.—The defendant paid into court that proportion of the sum at which the sugars were *valued in the policy*, which the price of the damaged bore to that of the sound sugars at *Hamburgh* (*a*).—The only question was, by what measure or rule the damage ought to have been estimated.—The plaintiff proved that, at the time of the insurance, sugars were worth 35 l. per hogshead at *Hamburgh*; but that the expectation of a peace had suddenly sunk them; that the owner of the sugars, before the ship arrived at *Hamburgh*, and before he could know that they were damaged, had sent orders that they should be housed there till the price should rise above 30 l. per hogshead; that, in fact, the negociation not taking place, sugars did not rise 25 l. *per cent*; that he might have sold these sugars at 30 l. per hogshead, if they could have been kept, and the da-

have fetched 23 l. 7 s. 8 d.; so that the difference was 3 l. 7 s. *per* hogshead. The loss in this case, is that proportion of 30 l. (the value in the policy) which 3 l. 7s. (the difference between damaged and sound at the port of delivery) bears to 23 l. 7 s. 8 d. the price of the sound at the port of delivery. —The amount of the loss does not depend on the prices in the market at the port of delivery: But the proportion of the *prime cost* which the loss amounts to, may be ascertained by the prices which the damaged and sound bear to each other in the port of delivery.

(*a*) The reporter of this case makes Lord *Mansfield* state that the sum paid into court bore the like proportion to the sum at which the sugars were valued in the policy, (30l.) as the price of the damaged sugars (20l. 0s. 8d.) bore to the price of the sound at *Hamburgh* (23 l. 7s. 8 d.). This, by a common operation of arithmetic, would be 25 l. 14 s. per hogshead, which shews that the rule by which the money was paid into court, is not correctly stated in the report. The sum paid into court must have borne the same proportion to 30 l. as 3 l. 7 s. (the difference between the sound and damaged sugars at *Hamburgh*) bore to 23 l. 7 s. 8d. (the price of the sound there). This comes to 4l. 5s. 11½d. per hogshead the real amount of the loss, according to the principles laid down by Lord *Mansfield*, in delivering the opinion of the court.

mage they had received was the only reason why they were not kept. The plaintiff, therefore, insisted that the necessity of an immediate sale, and the loss sustained by it, ought to have been taken into the account in computing the damage.—Lord *Mansfield*, who tried the cause, left it to the jury to decide, *whether the difference between the sound and the damaged sugars, at the port of delivery*, ought to be the rule: Or, whether *the loss occasioned by an immediate sale*, should be taken into consideration. The jury, amongst whom were many considerable merchants, who perfectly understood the subject, and formed their judgment from their own experience, found the defendant's rule of estimation to be right, and gave their verdict for him accordingly.—Upon a motion for a new trial, the court were unanimously of opinion that the plaintiffs were not entitled to have the price for which the damaged sugars were sold, made up to 30l. per hogshead; and that the rule by which the jury had gone was the right measure.—Lord *Mansfield*, in delivering the opinion of the court, said,—"The rule by which the defendant and the jury have gone is this:—The defendant takes the proportion of the difference between sound and damaged sugars in the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price, *in money*, which either sound or damaged sugars bore at the port of delivery. He says the proportion of the difference is equally the rule, whether the goods came to a rising or a falling market. For instance; suppose the prime cost or value in the policy to be 30l. and the damaged goods sell for 40l.; but, if sound, would have sold for 50l.; the difference is a fifth: The insurer must therefore pay a fifth of 30l:—*E converso*, if they come to a losing market, and, being damaged, sell for 10l.; but if sound would have sold for 20l.; the difference is one half: The insurer must therefore pay 15l. that is half the prime cost or value in the policy. Two objections have been made to this rule: *First*, that it is going by a different measure in the case of a *partial*, from that which governs in the case of a *total*, loss; for, upon a total loss, the prime cost, or value in the policy,

This rule equally holds whether the goods come to a rising or a falling market.

 must

muſt be paid.—The anſwer to which objection is, that the diſtinction is founded in the nature of the thing. Inſurance is a contract of indemnity againſt the perils of the voyage, to the amount of the value in the policy; and therefore if the thing be totally loſt, the inſurer muſt pay the whole value which he inſured at the out-ſet. But, where a *part* of the commodity is ſpoiled, no meaſure can be taken from the prime coſt to aſcertain the quantity of the damage ſuſtained. The only way is to aſcertain whether the thing be a third or a fourth worſe than the ſound commodity; and then pay a third or fourth of the prime coſt or value of the goods ſo damaged (*a*). The *ſecond* objection is, that this being a valued policy, was in nature of a *wager*; and if ſo, there could be no *partial* loſs, and the inſured could only abandon and recover as for a total loſs; becauſe the value ſpecified was fictitious." —In anſwer to this objection, his Lordſhip ſaid,—" To argue that there can be no adjuſtment of a partial loſs upon a valued policy, is directly contrary to the very terms of the policy itſelf. It is expreſsly provided that the article of *ſugar* ſhall be ſubject to *average*, if the loſs exceed 5 *per cent.*; and even if it were not ſubject to average the conſequence would be that every partial loſs muſt thereby become total: But then, the inſured could only recover in the event of a total loſs; and conſequently the plaintiffs in this caſe would not be entitled to recover at all; for there is no colour to ſay that this was a total loſs; beſides the plaintiffs have taken the goods and ſold them. In oppoſition to the meaſure which the jury have gone by, the plaintiffs con-

(*a*) Lord *Mansfield*, in this anſwer to the firſt objection, ſeems, according to the report, to have been labouring to account for the ſuppoſed difference between the meaſure in the caſe of a partial and a total loſs. But with great deference, it would ſeem that the rule to which the objection is made, and which fixes the proportion of the *prime coſt* which muſt be paid in caſe of a partial loſs, is not inconſiſtent with, but is founded upon, the practice of paying the whole of the prime coſt upon a total loſs.

tend that they ought to be paid the *whole value in the policy*, upon one of two grounds. 1ſt. That the general rule of eſtimating ſhould have been the difference between the price the damaged goods ſold for, and the prime coſt, or value in the policy. Here the damaged goods ſold for 20 l. 0 s. 8 d. per hogſhead; and the underwriters ſhould make it up 30 l.—To this I anſwer, that it would involve the underwiter in the riſe or fall of the market; and, in ſome caſes, ſubject him to pay vaſtly more than the loſs; in others it would deprive the inſured of any ſatisfaction, though there were a loſs.—For inſtance; ſuppoſe the prime coſt, or value in the policy, 30l. per hogſhead; the ſugars damaged; the price of the ſound 20l.; the price of the damaged 19 l. 10 s.: The loſs is about a *fortieth*, and the inſurer would be obliged to pay above a *third*. Snppoſe they come to a riſing market; the ſound ſugars ſell for 40l.; the damaged for 35 l: The loſs is an *eighth*; yet the inſurer would have to pay nothing.—The 2d ground upon which the plaintiffs contended that the 30l. ſhould be made up, was that it appeared that the ſugars *would* have ſold for that price, if the damage had not made an immediate ſale neceſſary. The moment the jury brought in their verdict, I was ſatisfied they had done right in diſregarding the *particular circumſtances* of this caſe; and I was convinced of this, after converſing with perſons of experience in adjuſtments, and after the ſubject had been fully argued at the bar. The nature of the contract is, that the goods ſhall come ſafe to the port of delivery; or if not, that the inſurer will indemnify the inſured to the amount of the prime coſt. If they arrive, but leſſened in value by damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it muſt be, by putting the inſured in the ſame ſituation, (relation being had to the prime coſt, or value in the policy), which he would have been in, if the goods had arrived free from damage; that is, by paying ſuch *proportion*, or *aliquot part*, of the *prime coſt*, or value in the policy, as correſponds with the proportion, or aliquot part, of the *diminution in value* occaſioned by the damage. The duty accrues upon the ſhip's arrival

An inſurer is never to be involved in the riſe or fall of the market.

The indemnity ſecured by the policy is ſuch an aliquot part of the prime coſt as correſponds with the diminution in value occaſioned by the damage.

and landing her cargo at the port of delivery, and the insured has then a right to demand satisfaction. The adjustment can never depend upon future events or speculations: How long is he to wait; a week, a month, or a year?—In this case, the price rose; but, if peace had been made, the price would have fallen: But the defendant did not insure that there should be no peace. It is true that the owner acted upon political speculation, and ordered the sugars to be kept till the price should be 30l. or upwards: But no private scheme or project of trade of the insured can affect the insurer: He knew nothing of it: He did not undertake that sugars should bear a price of 30l. a hogshead. If speculative distinctions of the merchant, and the success of such speculations, were to be regarded, it would introduce the greatest injustice and inconvenience. The insurer knows nothing of them. Here the orders were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery."

The duty accrues upon the ship's arrival and landing her cargo; and does not depend on future contingencies.

No speculation of the insured can increase or diminish the amount of the loss.

In the above case it was settled that the relative prices of the sound and unsound goods at the port of delivery furnished the true basis for calculating the proportion of the prime cost which the insurer is to pay in case of a partial loss. But it has since been made a question, what are to be taken as the prices of the sound and damaged goods, from which the calculation shall be made? Upon that question it has been determined that the respective prices of the damaged and the sound commodity are not to be taken from the *net proceeds*, but from the *gross produce* of each, at the port of delivery.

Thus, where an action was brought on a policy upon goods insured from *Sicily* to *Hamburgh* to recover a partial loss occasioned by the sea water having damaged the goods.—At the trial it was referred to one of the jury to ascertain the amount of the loss, who settled it at 76l. 7s. 4d. *per cent.*—There was a motion for a new trial upon the ground that this calculation had pro-

Johnson v. Sheddon, 2 *East* 581.

The prices of the sound and damaged goods are not to be taken from the net proceeds, but from the gross produce at the port of delivery.

ceeded on a mistake, the person who made it having taken for his foundation, the difference between the *net proceeds* of the damaged goods, and what they would have produced if sound; instead of the difference between the *gross* produce of each.—The court determined that the calculation was wrong, and the objection well founded. Mr. Justice *Lawrence*, who delivered the opinion of the court, said,—"It is agreed on both sides that the loss is to be estimated by the rule laid down in *Lewis* v. *Rucker*(a); that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which he is responsible, is that which arises from the deterioration of the commodity by sea damage; and that he is not liable for the duties or charges payable at the place of delivery. Lord *Mansfield*, in laying down the rule, in that case, speaks of the *price* of the thing at the port of delivery, as the means of ascertaining the damage; by which he must mean the *whole* sum which is to be paid for the thing: For the net proceeds are not the price, but only so much of the price as remains after the deduction of certain charges. His lordship cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums; for such payment is in effect but a part of the price, and is not an equivalent for the thing so sold: For if the purchaser were not liable to the duties and charges, we would give as much more as the amount of those charges comes to. The prime cost and those charges constitute the price. One objection to taking the net proceeds, instead of the gross proceeds, as the basis of the calculation, is, that where equal charges are to be paid on the sound and damaged commodity, the underwriter will be affected by the fluctuation of the market. For if two equal quantities be taken from two unequal quantities, the smaller the unequal quantities are, the greater will be the difference between the remainders. But whether the goods come to a rising or a falling market, the deterioration must be the same, and the underwriter should pay the same; which he will do, if the gross pro-

(a) Sup. 537.

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duce of the ſound and unſound be taken as the ſubject of compariſon. Therefore the prices upon a ſale before the maſt, when equal duties are to be paid, do not correſpond with the true proportion between the ſound and the unſound commodity, or ſhew in what degree the one is inferior in value to the other."

The ſame queſtion came before the court of *Common Pleas* in *Michaelmas* Term 1802, when that court fully approved the rule ſo ably laid down by Mr. Juſtice *Laurence*; and determined that the loſs muſt be calculated upon the groſs proceeds, and not upon the net proceeds, of the goods inſured, at the port of delivery. *Harry* v. *Roy*, *Ex. Aff.* 3 *Boſ.* & *Pul.* 308. S. P.

Where there is a partial loſs upon a valued policy, but the value in the policy *exceeds the intereſt of the inſured*, it is the conſtant uſage to adjuſt a partial loſs in the ſame manner as if the policy were *an open one*; and the computation muſt therefore be by the *real intereſt* on board, and not by the value in the policy. If the value in the policy exceed the intereſt, the computation muſt be made by the real intereſt, not by the value in the policy.

Thus, where an inſurance was made on a ſhip and goods on board,—' At and from *Omoa* to *London*; *valued at the* '*ſum inſured*.' There was no value mentioned in the body of the policy, but only the ſums wrote againſt the different names on the back. There were other policies on the ſame ſhip and goods, amounting in the whole to 99,500 l. which exceeded the amount of the intereſt of the inſured (*a*). The ſhip and a great part of the cargo were loſt, about one tenth only of the goods being ſaved. One queſtion at the trial of this cauſe was, how the loſs, which was conſidered as a partial one, ſhould be adjuſted (*b*). The broker ſwore that, on ſuch policies as *Le Cras* v. *Hughes*, B. R. E. 22 *G*. III. MS.

(*a*) The ſhip and goods inſured had been captured by ſea and land forces jointly. The inſurance was on behalf of the officers and crews of the ſhips; but as the land forces were entitled to a ſhare in this prize, the ſum inſured though leſs than the value of the ſhip and goods, was found to be more than the intereſt of the inſured. Vid. ſup. ch. 4. § 1, 2.——

(*b*) The principal queſtion was, whether the inſured had an inſurable intereſt in the ſhip and goods. For this vid. ſup. 108, where there is a fuller report of this caſe.

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this, where a *total loſs* happened, the whole ſum was paid: But where it was only a partial loſs, they conſidered it as an open policy, and paid a proportion, not of the ſum inſured, but of the value of the goods.—The court of King's Bench, when this caſe came before them, thought it, at firſt, like that of *Lewis* v. *Rucker* (*a*) But the intereſt of the inſured, in the ſhip and goods, heing leſs in value than the ſum inſured, the court held that this caſe differed from that of *Lewis* v. *Rucker*, and that the conſtant uſage in ſuch caſes was, upon a total loſs, to pay the whole (*b*); but, upon a partial loſs, to conſider it as an *open policy*. The court were therefore of opinion that the computation in this caſe muſt be by the *real intereſt* of the inſured on board, and not by the value in the policy.

The true ground of diſtinction between this caſe and that of *Lewis* v. *Rucker* is, that, in that caſe, the value in the policy was conſidered as the *prime coſt*, and this was never diſputed; whereas, in this caſe, it appears that the intereſt of the inſured was conſiderably leſs than the value in the policy.

Sect. III.

What ſhall be the Effect of an Adjuſtment.

An adjuſtment ſigned by the underwriters is *primâ facie* evidence againſt them, and ſufficient of itſelf, if not impeached, to entitle the inſured to recover without any other proof.

AN adjuſtment being indorſed on the policy and ſigned by the underwriters with the promiſe to pay in a given time, is *primâ facie* evidence againſt them, and amounts to an admiſſion of all the facts neceſſary to be proved by the inſured to entitle him to recover in an action on the policy. It is like a note of hand, and being proved, the inſured has no occaſion to go into proof of any other circumſtance. This was the opinion of Lord C. J. *Lee* in the following caſe.

(*a*) Sup. 624.——(*b*) Vid. ſup. 287.

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An insurance was made on a ship, 'At and from 'Jamaica to London, interest or no interest, and without 'benefit of salvage, with a warranty that the ship should 'sail with convoy.'—The ship sailed with convoy, but was so much damaged in the voyage, that she was obliged to bear away for *Charleston*, where she was condemned and broke up.—All the underwriters, being satisfied of the truth of this case, paid their losses, except the defendant, who went so far as to settle it, and according to the custom upon such occasions, indorsed the policy in these words;—"Adjusted the loss on this policy at "98l. *per cent.*, which I agree to pay one month after "date. *London*, 5th *July* 1745. *Henry Gouldney*."—When the money became due, he insisted on fuller proof, particularly of the ship's sailing with convoy, and her condemnation.—An action was brought on the policy; and Lord C. J. *Lee*, who tried the cause, was of opinion that this was to be considered as a note of hand, and that the plaintiff had no occasion to enter into the proof of the loss. The jury found a verdict for the plaintiff.—The same rule was followed, the next year, by the same learned judge, in the case of *Hewitt* v. *Flexney* (*a*). *Hog* v. *Gouldney*. at N. P. after Trin. 1745, at G. H. *Beawes* 310.

It has been observed that the words used by Lord Chief Justice *Lee*, in this case, were *extremely large* (*b*); and that the true rule upon the subject might be better collected from two subsequent cases, which will be mentioned hereafter. The words which are supposed to be too large are, "That the memorandum indorsed on "the policy, was to be considered as a note of hand, "and that the plaintiff had no occasion to enter into the "proof of the loss."—It is not easy to discover in what respect the rule here laid down is too large. The memorandum indorsed on the policy, and signed by the defendant, unquestionably amounts to an admission of his subscription to the policy; of the plaintiffs interest in the ship insured, (if the terms of the policy had not rendered that unnecessary); of her having sailed with convoy; of a loss having happened, and that the amount of that This rule objected to. The rule vindicated. The adjustment admits the whole case, and like a note of hand, is *primâ facie* evidence of a debt.

(*a*) *Beawes* 308.—(*b*) *Park* 118.

loſs was the ſum ſpecified in the adjuſtment, which contains a promiſe to pay in one month. This, like a note of hand, is *primâ facie* evidence of a debt; and it ſeems to be as unneceſſary for the plaintiff, in an action on the policy, to prove the facts admitted by the adjuſtment, as to prove the conſideration of a note of hand, before it is impeached.—But in neither caſe is "*the door ſhut againſt inquiry.*" A note of hand is not *concluſive* evidence of a conſideration, though value received be expreſſed in it. On the contrary, it may be impeached by ſhewing that it was made upon an unlawful, or corrupt conſideration, or without any conſideration at all. So, an adjuſtment, like that which is ſtated in the foregoing caſe, may be impeached by ſhewing that the underwriter was induced to ſign it by ſome fraud or concealment, or by ſome miſconception of the law or fact. But, in either caſe this muſt be done by *evidence*, and not by *doubts or ſurmiſes* after the time for payment is come; nor can the plaintiff be put under the neceſſity of proving the conſideration of the note, in the one caſe, or the facts admitted by the adjuſtment, in the other, until a ſtrong ground of ſuſpicion, at leaſt, be raiſed againſt it by *evidence* on the part of the defendant.

It is not, however, concluſive, but may be impeached by evidence.

In the firſt of the two caſes adduced in ſupport of the objection to the rule, as laid down by Lord C. J. *Lee*, a loſs had been adjuſted at 50l. *per cent.*, and an action was brought on the policy.—It was contended on the part of the defendant, that the adjuſtment was not binding; but that, if it were, it ought to have been declared on *ſpecially*.—Lord *Kenyon*, who tried the cauſe, was of opinion that it was not neceſſary to declare ſpecially. He ſaid that the adjuſtment was *primâ facie* evidence againſt the defendant: But if there had been any miſconception of the law or fact upon which it had been made, the underwriter was not *abſolutely concluded* by it.—This turned out to be the caſe, and there was a verdict for the defendant.

The adjuſtment may be given in evidence in an action on the policy; and the inſured is not obliged to declare ſpecially on it.

Rodgers v. *Maylor*, at N. P. after Trin. 1790, *Park* 118. *Sheriff* v. *Potts*, 5 *Eſp.* N. P. Rep. 96. S. P.

It is *primâ facie* evidence againſt the underwriter; but he may impeach it.

The doctrine of Lord *Kenyon*, in this caſe, far from ſhaking, or even narrowing the rule, as laid down by Lord C. J. *Lee*, ſeems, on the contrary, to have ſtrongly confirmed it. Lord *Kenyon* ſays, that if there had been any

any misconception of the law or fact upon which the adjustment had proceeded, the underwriter would not have been *absolutely concluded* by it. It is plain, then, that he considered the adjustment like a note of hand, as *primâ facie* evidence of a debt, but not conclusive, since the adjustment, like a note of hand, might be impeached by evidence on the part of the defendant.

De Garron v. *Galbraith*, at N. P. after Trin. 1795. *Park* 118.

In the second case adduced in support of the objection to the rule, as laid down by Lord C. J. *Lee*, it is stated that the plaintiff went to trial, having no evidence to produce but the adjustment; and the witness who proved it, swore that, soon after they had signed it, *doubts arose in the minds of the underwriters*, and they refused to pay; upon which, Lord *Kenyon* said that, under these circumstances, the plaintiff must go into other evidence; and not being able to do this, he was nonsuited.—In the following term, a motion was made to set aside this non-suit, upon the ground that an adjustment was *primâ facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's subscription to the policy.—Lord *Kenyon* said;—" I admit the adjustment to be evidence in the cause to a certain extent: But I thought at the trial, and still think, that when the same witness who proved the signature of the defendant to the adjustment said, that, soon after the adjustment took place, doubts arose in the minds of the underwriters, *as to the honesty of the transaction*, and they called for further proof, the plaintiff should have produced other evidence; and that, shutting the door against enquiry, after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters.—Accordingly the court refused to grant a new trial.

Whether this case can be deemed a sufficient authority to narrow the rule laid down by Lord C. J. *Lee*.

In the account of what passed at the trial of this cause, it does not appear upon what subject the doubts arose in the minds of the underwriters, nor at what time the further proof was called for. It would seem, from the above report, that further proof was only called for at the trial, by the learned judge who tried the cause. It is unfortunate that there is no account of this case in the term reports, the sixth volume of which contains the cases of the term in which

which it is said to have come before the court. It is to be presumed that an accurate statement of the evidence on which the plaintiff was nonsuited, would have clearly shewn that the decision of the learned judge at *nisi prius*, and afterwards of the court of King's Bench, was correctly right; that justice was done; and that, under the particular circumstances of the case, this might have been a very proper exception to the rule, as laid down by Lord C. J. *Lee*. But as the case stands, in the above report of it, it would be very difficult to reconcile it, even to the decision of Lord *Kenyon* himself, in the above case of *Rodgers* v. *Maylor* (*a*); nor can it be accounted for, upon any known principle of law, that an underwriter, who had signed an adjustment of a loss, with a promise to pay it, might afterwards, merely because he chose to alledge that *doubts had arisen in his mind*, refuse to pay the sum he had acknowledged to be due; and that, merely on the suggestion of these doubts, the insured should be called upon, at the trial, to prove his whole case, at a time, too, when it was no longer, perhaps, in his power to procure the necessary evidence. The candour and fairness which ought to preside in the litigation of all commercial questions, would never go the length of requiring this. If, indeed, the underwriters, harbouring these doubts, should give the insured reasonable notice of their intention to dispute his claim, it would be competent to them, perhaps, to do so; and even then, they ought to come prepared to shew some fraud or concealment on the part of the insured; or some misconception of the law or the fact, on their own part, which had induced them to agree to the adjustment. This would make an end of the adjustment, and it would then be incumbent on the insured, under whatever difficulty, to go into the proof of his whole case. It is possible, nay, very probable, that this, or something like it, appeared in the case of *De Garron* v. *Galbraith*. But, as that case is reported, it cannot be deemed of sufficient weight or authority to alter or shake the rule as laid down

(*a*) Sup, 634.

in the case of *Hog* v. *Gouldney*; and which, as has been already observed, is greatly enforced and confirmed by Lord *Kenyon*, in the case of *Rodgers* v. *Maylor* (*a*).

But it is said, that the spirit of the rule laid down in this last case, was adopted in the *very modern* case of *Thellusson* v. *Fletcher* (*b*), which has been already fully stated (*c*). The only point determined in that case at all applicable to the present subject was, that, if an underwriter suffer judgment to go by default, he thereby confesses the plaintiff's title to recover, and the plaintiff shall not, therefore, be obliged to prove his interest; a point about which, without that decision, no lawyer could have entertained much doubt.—All that can be said on this determination is, that, as far as it can be supposed to bear on the present question, it corroborates the rule as laid down by Lord C. J. *Lee*.

(*a*) Vid. *Christian* v. *Combe*, 1 *Esp*. Rep. 486, where Lord *Kenyon* lays down the same doctrine.——(*b*) *Thellusson* v. *Fletcher* was determined 16 years *before* the case of *De Garron* v. *Galbraith* ——(*c*) Sup. 129.

CHAP. XV.

Of Return of Premium.

THE premium paid by the insured, and the risk which the insurer takes upon himself, are considerations, each for the other: they are co-relatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk, without receiving the premium; nor shall he retain the premium, which was the price of the risk, if in fact, he run no risk at all (*a*). For wherever a man receives the money of another upon a consideration which happens to fail, or is never performed, he is under an obligation, from the ties of moral honesty and natural justice, to refund it. In such case the law implies a debt, *quasi ex contractu*, and gives the insured an action against the insurer, for money had and received to his use, to recover back the money so received (*b*).

It will be our business in the present chapter to shew in what cases, and under what circumstances, the insured shall be entitled to a return of premium; and how that return shall be made.—This may be done under the following heads;

I. *Where the contract is void* ab initio;
II. *Where the risk has not been commenced;*
III. *Upon the performance of certain stipulations;*
IV. *When the deduction of one half* per cent. *shall be allowed.*

(*a*) Per Lord *Mansfield*, 3 *Bur.* 1240. Vid. *Pothier*, h. t. n. 180.——(*b*) Vid. 2 *Bur.* 1008; *Doug.* 454; *Cowp.* 668; 1 *Show.* 156. 3 T. R. 266.

Sect. I.

Of Return of Premium where the Contract is void ab initio.

IN general, when the contract is void *ab initio*, it is so, either, 1. *For want of interest in the insured*; or, 2. *Because the insurance is illegal*; or, 3. *For fraud on the one side or the other.*—We will enquire in what cases there shall be a return of premium on each of these grounds.

1. *Where the Contract is void for Want of Interest.*

If an insurance be made without interest, or for more than the real interest, there shall be a return of premium.

A want of interest may be either *total*, as where the insured has nothing on board the ship; or, *partial*, as where he has an interest in the thing insured, but not to the amount stated in the policy. And it may be laid down as a general rule, that if, through mistake, misinformation, or any other innocent cause, an insurance, in a single policy, be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value; in the one case, the insurer shall return the whole premium; in the other, he shall return in the proportion which the true value bears to the sum insured. Thus, if a man, supposing he has goods on board a certain ship to the value of 1,000l. insure to that amount, but afterwards find, either that he has no goods at all on board, or that he has goods only to the amount of half the insurance: In the one case, he would be entitled to a return of the whole premium; in the other to a return of a moiety (*a*). And all the underwriters upon a policy in which the effects are insured beyond their value, must bear any loss that may happen, and repay a part of the premium, in proportion to their

(*a*) Vid. *Le Guidon*, ch. 2, art, 18. Ord. of *Amst.* art. 22. *Pothier*, h. t. n. 77, 183. *Roccus*, n. 82. *Valin*, sur. art. 23, p. 67.

respective

respective subscriptions, without regard to the priority of their dates (*a*).

If there be an over-insurance by *several policies*, the underwriters will all be liable to the extent of the value; and to make a return of premium for the residue.

If, by *several policies*, made without fraud, the sum insured exceed the value of the effects, these several policies will, in effect, make but one insurance, and will be good to the extent of the true interest of the insured; and, in case of loss, all the underwriters on the several policies shall pay according to their respective subscriptions, without regard to the priority of their dates. And it follows from thence, that all the underwriters on the several policies would be equally bound to make a return of premium for the sum insured above the value of the effects, in proportion to their respective subscriptions.—In this particular, our law, as we have already shewn (*b*), differs from the ancient law, and indeed from the law of most of the other maritime states at this day.

Upon a wager policy the insured cannot recover back the premium, at least after the risk is run.

We have already seen that a wager policy, at least since the stat. 19 *G.* II., c. 37, is illegal and void (*c*). Upon such a policy the insured cannot recover back the premium; at least if he wait till the risk is over, he shall not, after thus taking the chance of a loss, and of obtaining from the *generosity*, at least, of the underwriters, the sum insured, be permitted to recover back the premium.

Lowry & anr. v. *Bourdieu*, Doug. 451.

An insurance on an *East India* ship and goods, valued at 26,000l. '*being the amount of the captain's bond to the insured*,' is a wager and void; but the insured shall not, after the risk is run, have a return of premium.

The plaintiffs had lent one *Lawson*, captain of the *Lord Holland* Indiaman, 26,000l., for which he gave them a *common bond*. While he was with his ship at *China*, the plaintiffs got a policy underwritten by the defendant and others, 'At and from *China* to *London*, beginning the 'adventure *upon the goods*, from the loading thereof on 'board the said ship at *Canton*, &c.' and '*upon the said ship* 'from her arrival at *Canton*, valued at 26,000l. being the 'amount of Captain *Patrick Lawson*'s common bond pay'able to the parties, as shall be described at the back of

(*a*) *Habet omnis, assecuratio hoc peculiare, ut in ea non sit prius nec posterius, quantum ad effectum et validitatem contractus; sed ultimus assecurator tantundem participat in damno et lucro ex assecuratione provenienti, quantum prior.* Kuricke *diatr.* n. 16.—(*b*) Vid. sup. 146.—(*c*) Vid. sup, ch. 4. § 2.

'this

'this policy, dated 16th of *December* 1775: And in case 'of loss, no other proof of interest to be required than 'the exhibition of the said bond; warranted free from 'average, and without benefit of salvage to the insurers.' —At the head of the subscription was written, "*On a* "*bond as above expressed.*"—Captain *Lawson* failed from *China* and arrived safe with his adventure in *London.*—The insured brought an action to recover back the premium, on the ground that the insurance having been made without interest, the policy was void, within the statute (*a*). There was a verdict for the defendant by the direction of Lord *Mansfield*, who tried the cause.—Upon a motion for a new trial, the court held that the verdict was right.—Lord *Mansfield* said,—"This is clearly a gaming policy. The nature of the insurance is known to both parties. The plaintiffs say; 'We mean to game; 'but we give our reason for it; captain *Lawson* owes us a 'sum of money, and we want to be secure in case he should 'not be in a situation to pay us.' It was a hedge. But they had no interest; for, if the ship had been lost, and the underwriters had paid, still the plaintiff would have been entitled to recover the amount of the bond from *Lawson.*—This, then, is a gaming policy, and against an act of parliament; and therefore it is clear that the court will not interfere to assist either party; according to the well-known rule, that, *in pari delicto melior est conditio possidentis*: Not, that the defendant's right is better than that of the plaintiff; but he must draw his remedy from clear fountains.—Mr. Justice *Ashurst* concurred in this opinion. Mr. J. *Willes* thought this was not a gaming policy; that the money was paid upon a mistaken idea, and ought to have been refunded.—Mr. Justice *Buller* agreed with Lord *Mansfield* and Mr. Justice *Ashurst*, that this was a gaming policy, being without interest: But he held that the reason why the plaintiffs could not recover was, that an action brought to rescind a contract, must be brought while the contract continues executory; and then it can only be done on the terms of

Yet, before the risk is run, and while the contract is executory, the insured may recover back his premium.

(*a*) 19 G. II. c. 37. sup. 127.

restoring the other party to his original situation. He mentioned a case of *Walker* v. *Chapman*, in B. R. some years before, where a sum of money had been paid in order to procure a place in the customs. The place had not been procured, and the party who paid the money, having brought his action to recover it back; it was held that he should recover, because the contract remained executory. "So," said he, "if the plaintiffs in this case had brought an action before the risk was over, they might have recovered; but having waited till the risk was run, it was then too late (*a*)."

The reader, in perusing the foregoing case, must have observed that though Mr. Justice *Buller* concurs in opinion with Lord *Mansfield*, that the insured was not, under all the circumstances of the case, entitled to a return of premium, yet he assigns a different reason for his opinion.—Lord *Mansfield* considered the insurance as an illegal contract, and both parties offenders against

(*a*) There is a case of *Wharton* v. *De la Rive*, (at N. P. after Mich. 1782), mentioned in *Park* 376, where an action is said to have been brought on two wagers, 'one of 26l. 5s. to 100 l.; the other of 13l. 2s 6d. to 50l.' that the *American* colonies would be acknowledged as independent states by *France*, some time between the first of *February* and the first of *April* 1778. It is stated that, upon the opening of the case for the plaintiff, Lord *Mansfield* directed a nonsuit, but it does not appear upon what ground; whether because the wagers were illegal, or because they were in nature of wagering insurances, and void by the act. It is said, however, that the plaintiff's counsel insisted on a verdict for the premium, as if they were in fact insurances, which Lord *Mansfield* permitted, upon the ground of the contract being void. The case of *Lowry* v. *Bourdieu* was then cited by the defendant's counsel, to shew that he was entitled to keep the premium. Lord *Mansfield* is made to answer, that that case did not apply; for there the *risk had been run*.—But that could not distinguish it from the case before his lordship; because, if these wagers were to be considered as insurances, the risk was over on the first of *April* 1778, five years before the action was brought. Nay, the action was brought on the ground that the plaintiff had won his wager.

the law; and then founds his judgment on the maxim, *in pari delicto melior est conditio possidentis*; from which it may be inferred that it was his lordship's opinion, that, even if the insured had thought proper to rescind the contract before the risk commenced, or, which is the same thing, before the event was known, he could not have recovered back the premium.—Mr. Justice *Buller* takes a different ground; namely, that though an action might have been maintained to recover back the premium while the contract was *executory*, upon the terms of restoring the underwriter to his original situation; yet, that, after the risk is run, it is too late to attempt to rescind the contract.

In the case of *Vandyk* v. *Hewet*, which we shall presently have occasion to mention more particularly, the court of King's Bench seems to have adopted the principle upon which Lord *Mansfield* founded his judgment. It would seem, therefore, that Mr. Justice *Buller*'s doctrine could apply only to the case of an insurance without interest, *innocently* made.

Upon the authority of this case it has since been determined, that if the contract be void, as being a re-insurance, within the stat. 19 *G*. II., c. 37, § 4, the insured shall not be entitled to a return of premium(*a*). If the contract be void, as being a re-insurance, there shall be no return.

If, under any circumstances, the insurer might, at any time, have been called upon to pay the whole sum insured, the premium is earned, and he shall not be obliged to return any part of it. Therefore, in the case of a valued policy, though the sum in the policy be twice the value of the effects insured, there shall be no return of premium (*b*). If the insurer could ever have been liable, there shall be no return.

If the insured have a contingent insurable interest in the thing insured at the time when the policy is effected, and the risk be once begun, there shall be no return of premium, though it should eventually turn out that he had no title to the thing insured. Therefore, though the If captors insure before condemnation, they shall not have a return on its being adjudged no prize;

(*a*) R. *André* v. *Fletcher*, 3 T. R. 266. Sup. 144.—
(*b*) 2 *Magens*, 137.

captors of a ſhip, ſeized as prize, have an inſurable intereſt therein before condemnation; yet, ſhould the ſhip afterwards be adjudged to be no prize, and reſtitution be awarded to the owners, there ſhall be no return of premium, if the riſk was commenced.

Boehm and others v. *Bell*, 8 T. R. 154.

Thus:—Three frigates having taken the ſhip *Weſtcapelle* off the *Cape of Good Hope*, then bound from *Batavia* to *Boſton*, the captors put her under the command of a lieutenant, as prize-maſter, and on the 30th of *January* 1797, wrote to their agents in *England*, mentioning the capture of the *Weſtcapelle*, which they ſuppoſed a lawful prize; and ſtating that, as there was no court of admiralty there, they were under the neceſſity of ſending her to *England* for trial; and then directed an inſurance, for that voyage, to be made on the ſhip and cargo, to the amount of 40,000l. (though the eſtimated value was 150,000l.) which the agents in *England* accordingly cauſed to be effected at a premium of 20 guineas *per cent.* to return 8l. *per cent.* if the ſhip departed from the *Cape* or *St. Helena*, with convoy for *England*, and arrived. The ſhip ſailed from the *Cape* with convoy for *St. Helena*, where ſhe arrived, and ſailed from thence for *England*, without convoy, and arrived in ſafety in the *Thames* on the 7th of *Auguſt* 1797. But the court of admiralty 'declared the ſhip and cargo to 'be *American* property, and decreed them to be reſtored, 'except the part claimed by the chief mate, who was pro- 'nounced to be an enemy, and his property on board con- 'demned as lawful prize.' The ſhip and cargo, except the part of the chief mate, were reſtored accordingly. After this ſentence, the plaintiffs brought an action againſt the defendant, to recover 18l. 19s. 10d. *per cent.* as a proportion of the premium to be returned in reſpect of the ſhip and ſuch part of the cargo as had been decreed to be reſtored. The defendant inſiſted, 1ſt. That the inſured had an inſurable intereſt to the amount of the ſum inſured, and, in the event of a loſs, might have recovered againſt the inſurers; that the fallacy of the plaintiff's argument aroſe from not diſtinguiſhing between an *inſurable intereſt* and an *abſolute indefeaſible property*; that the inſured had the poſſeſſion of the thing inſured, together with a contingent

contingent intereſt, in the event of its being condemned; beſides, they had an immediate intereſt in the ſubject matter, ariſing out of their reſponſibility for the care and ſafety of the ſhip; for in caſe of groſs negligence or miſconduct, the court of admiralty would adjudge a compenſation to the owners in damages; and if, in any event, the inſurers might have been anſwerable, there could be no return of premium. 2dly, That this being a valued policy, made *bonâ fide*, without any intention of fraud, and the inſured having an indiſputable intereſt, the extent of the intereſt was immaterial. 3dly, That as this was an inſurance on foreign ſhips, it was not neceſſary that the inſured ſhould have any intereſt at all, it not being within the ſtat. 19 *G.* II., c. 37.—The court were clearly of opinion that the inſured had an inſurable intereſt, and that the riſk having been run, there could be no return of premium.—Lord *Kenyon* ſaid,—" I will not enter into a diſcuſſion of either of the two laſt points, becauſe the firſt alone furniſhes, in my opinion, an anſwer to this action. —The real queſtion in this caſe is one of the moſt ſimple that can be ſtated. It is merely this, whether the inſured had or had not *any intereſt*. The captors had the poſſeſſion of the property inſured, and from that poſſeſſion certain rights and duties reſulted. If it were a legal capture, the captors were entitled; if not, they were liable to be called to an account in the court of admiralty, where they might be amerced in damages and coſts. It was important, therefore, to them to take care that there ſhould be ſomething forthcoming to anſwer for the amount of theſe damages."

2. *Where the Inſurance is upon an illegal Trading.*

It has already been ſhewn (*a*) that no *Britiſh* ſubject can legally carry on any commerce with the enemies of the ſtate, without the King's licence; and that an inſurance made to protect ſuch commerce is void; and it has

Though an inſurance to protect a trading with the enemy void, there ſt. be no return premium.

(*a*) Sup. ch. 3. § 4.

been determined that the insured, in such case, cannot recover back his premium: And though this was after a loss had happened, it was after the insurers had availed themselves of the illegality of the contract to avoid paying the loss, and it was founded upon the same principle upon which Lord *Mansfield* supported his judgment in the case of *Lowry* v. *Bourdieu* (*a*), which would have maintained the decision in that case, even if the action had been brought while the contract was executory.

Vandyk & others v. *Hewitt*, 1 *East* 96.

Thus:—Goods were insured, 'At and from *London* 'to *Embden* or *Amsterdam*, at a premium of ten guineas '*per cent.*, to return five upon their arrival at their place 'of destination.'—In an action on this policy for a loss by capture, it was averred in the declaration that the insurance was made for the benefit of certain persons therein named.—Upon the trial it appeared that the goods were shipped on board a *Prussian* neutral vessel, on account, partly of the plaintiffs who were naturalized foreigners resident in *London*, and partly of certain other persons, aliens, then resident in *Holland*. It appearing that the insurance was intended to cover a trading with *Holland*, then at war with this kingdom, the idea of recovering the loss was given up on the authority of the case of *Potts* v. *Bell* (*b*).—The plaintiffs then contended that they were entitled to recover back the premium, on the ground that the policy never attached, and the risk had therefore never commenced. And it was compared to the case of *Lacaussade* v. *White* (*c*), in which it was determined that a person who has deposited money upon an illegal wager may recover it back, even after the event is determined against him.—But the court were clearly of opinion, that the plaintiffs had no right to recover back the premium.—Lord *Kenyon* said;—"There is no distinguishing this case, on prin-

(*a*) Sup. 640.——(*b*) 8 T. R. 548, sup. 87.——(*c*) 7 T. R. 535.—But Vid. 8 T. R. 575, where it was held that if the money deposited upon an illegal wager be paid over to the winner, it cannot be recovered back.

ciple; from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country, he cannot recover back the goods themselves or the value of them (*a*). Both parties are in *pari delicto*, and *potior est conditio possidentis.*"

It has also been shewn (*b*), that no insurance can be legally made on an illegal trading with the *British* colonies. — And it is clearly binding upon all *British* subjects, who are not permitted to plead ignorance of *British* laws: In the following case, it was made a question, whether this rule was applicable to the case of foreigners, who cannot be presumed to possess a knowledge of our laws, and determined in the affirmative.

Morck & anr. v. *Abel*, 3 *Bos.* & *Pul.* 35.

The insured in a policy upon an illegal trading with the *British* colonies is not entitled to a return of premium, though he be a foreigner, and not presumed to be acquainted with our laws.

A policy was effected upon goods warranted *Danish* property, on board a *Danish* ship, 'At and from *Bengal*,' (in which were several *Danish* as well as *British* settlements) 'to *Copenhagen*, with liberty to touch, stay, and 'trade at all ports and places, &c.'—The goods insured were loaded at *Calcutta*, and the ship and cargo, in the voyage to *Copenhagen*, were captured by the *French*.—In an action to recover for this loss, it was objected that, by the navigation act, 12 *C.* II. c. 18. § 1, (*c*), it was unlawful to export goods from any *British* colony, in any vessel not belonging to a *British* subject. This objection prevailing, it was then insisted that if the exportation was illegal, the risk never commenced, and that the plaintiffs were therefore entitled to a return of premium; and it was urged that if, in any case, the court would presume a party to have been ignorant of the law, they might well do so in this, since, previous to the shipment in question, a practice had prevailed of allowing ships belonging to states in amity with *Great Britain*, to export goods from our settlements in *India*; in so much, that the stat. 37 *G.* III. c. 117, which passed only four months after this cargo was shipped, removed, under certain restrictions, the

(*a*) Vid. *Biggs* v. *Lawrence*, 3 T. R. 454. *Clugas* v. *Penaluna*, 4 T. R. 466. *Waymell* v. *Reed*, 5 T. R. 599.——(*b*) Ch. 3. § 2.——(*c*) Sup. 63.

 prohibition

prohibition imposed by the stat. 12 *C.* II.—But the court determined that the plaintiffs were not entitled to a return of premium.—They held, that no man, in a *British* court of justice, can seek the assistance of the law, who founds his claim upon a contravention of the *British* laws; that the plaintiffs being foreigners did not take them out of the general rule applicable to illegal contracts; and that there was very little room to presume ignorance of a law peculiarly applicable to the subjects of foreign states.

Lubbock v. Potts, 7 *Ea.* 449. — S. P.

So, where an insurance upon colonial produce, from *Trinidad* to *Gibraltar*, was holden to be illegal, as being against the navigation acts, it was determined that the insured was not entitled to a return of premium, though he did not appear to have been aware that the voyage was illegal.

3. *When there is Fraud on the one Side or the other.*

If the policy be void for fraud on the part of the insurer, the premium shall be returned.

When the policy is void on account of fraud committed by the insurer, there can be no doubt but that an action will lie to recover back the premium. As if an insurance be made on a certain voyage, lost or not lost, when the insurer, at the time he enters into the contract, privately knows that the ship is arrived safe; he will be bound to restore the premium (*a*).

Whether this be so, where fraud has been committed by the insured.

But, whether the insurer be bound to return the premium, in a case where fraud has been committed by the insured, is a question upon which more doubt might be entertained.—On the one hand, it might be contended that as the underwriter receives the premium in consideration of his taking upon himself the risk mentioned in the policy, he can have no right to retain it, if no risk was ever run; and, however improperly or unfairly the insured may have conducted himself, that will not furnish a new consideration to the underwriter, to be substituted in the place of that which was expressed in the policy, so as to enable him to retain the premium.

(*a*) Per Lord *Mansfield*, in *Carter v. Boehm*, 3 *Bur.* 1909, sup. 465, 6.

On

On the other hand, it might be deemed a ſort of ſolecism in our law, if the inſured could, by paying a premium, take the chance of reaping the propoſed advantage from a fraudulent inſurance; and yet, when detected, be entitled to recover back his premium, and ſo ſuffer no loſs. It has been ſaid, indeed, that the idea of enriching one man by the puniſhment of another is a ſtrange one, and ſomewhat inconſiſtent with the preſent notions of criminal juſtice (*a*).—But this idea is not ſtrange in our law; for it pervades all our ſtatutes in which penalties are given to common informers. It is true that the legiſlature gives theſe penalties, not for the ſake of enriching the informers, but to tempt them, by the hopes of enriching themſelves, to bring offenders to juſtice. When a penalty is given to the party grieved, it is given for the expreſs purpoſe of enriching him by the puniſhment of the wrongdoer. Upon the ſame principle, a ſecurity given to a lender upon an uſurious contract is declared void by the ſtat. 12 *Ann.* c. 16, § 1.; and yet the borrower, who is a party to the illegal contract, ſhall never be obliged to repay it. Nor is this principle confined to the ſtatute law; for, by the common law, the vendor of ſmuggled goods ſhall not be allowed to recover the price of them from the vendee, though he be far from innocent of the fraud againſt the revenue (*b*). Many other inſtances might be adduced from the common law to ſhew that one party ſhall be permitted to enrich himſelf by the puniſhment of another, even where they are both *in pari delicto* (*c*). And it would ſeem from the opinion of Lord *Mansfield* in *Lowry* v. *Bourdieu* (*d*), and that of Lord *Kenyon* in *Vandyk* v. *Hewit* (*e*), that, in the caſe of a gaming policy, the inſured cannot recover back his premium, even where the riſk has never been commenced: How much ſtronger, then, in point of juſtice, is the claim of an innocent underwriter, to retain the premium of an inſurance, by which the inſured meant

(*a*) *Park* 215.——(*b*) Vid. 3 T. R. 454; 4 T. R. 466; 5 T. R. 599.——(*c*) Vid. 3 T. R. 454, *Cowp.* 343.——(*d*) Sup. 640.——(*e*) Sup. 646.

to

to defraud him; and which is some satisfaction for the risk he has run, though not an adequate punishment of the insured, for his meditated fraud.

It has been determined that there shall be a return, if the contract be void for the fraud of the insured.

But reasonable and just as this idea may seem, it has not always prevailed. The court of chancery, in two instances, ordered a return of premium where the policies were declared void for fraud committed by the insured.

Whittingham v. Thornburgh, 2 *Vern.* 206. Pr. in ch. 20.

The first of these cases was an insurance on the life of one *Horwell*, for a year, interest or no interest. The insured, in order to draw in subscribers, agreed with one *Marwood*, a neighbour of *Horwell*'s, an eminent merchant who was a leading man in such cases, to subscribe first; but he was to lose nothing, in case *Horwell* died within the year, but, on the contrary, was to share what should be gained from the other subscriptions. Upon the credit of *Marwood*'s subscribing, several others, (who had enquired of him about *Horwell*), subscribed likewise. *Horwell* lived but four months. A bill was brought to be relieved against the policy; and it appearing that the insured had no interest in the life of *Horwell*, who was in a languishing condition at the time the insurance was effected, the court decreed the policy to be delivered up to be cancelled; but the premium was to be *repaid*, the plaintiffs deducting their costs thereout.

De Costa v. Scanderet, 2 P.W. 170. sup. 351. S. P.

The other case was an insurance on a ship, where the insured was guilty of a fraudulent concealment, for which the court of chancery ordered the policy to be delivered up to be cancelled; but, in like manner, directed the premium to be *paid back*, and allowed out of the costs.

Wilson v. Ducket, 3 *Bur.* 1361.

The same doctrine adopted in a court of law.

This rule of the court of chancery, was first adopted at law, upon the authority of the above two cases, in an action brought on a policy of insurance on a ship, with a count for money had and received by the defendant to the plaintiff's use.—The cause was tried under a decree of the court of Chancery, where the insured, (being then plaintiff), offered to pay back the premium which was 10l.; but no money was paid into court *in this action*.—There was a verdict for the plaintiff for the

10 l.

10 l. premium, on the count for money had and received, although the jury found the policy to have been *fraudulent*. In fact, in this, as in the foregoing case of *Wittingham* v. *Thornburgh*, the first underwriter was only a decoy-duck to mislead others, and was not himself to be bound by the policy.—But it was agreed to bring before the court this question,—" Whether, upon a policy being found *fraudulent*, the premium should be returned."—In support of the affirmative, the two last mentioned cases were cited on the part of the insured. On the other side was mentioned a case of ***Rucker*** v. *Hollingbury* before the Master of the Rolls, who held an opinion contrary to those cases.—But Lord ***Mansfield*** said there must have been some mistake in the statement of this case; for the practice of the court of Chancery was certainly agreeable to the former cases: He then enquired whether there was any common law determination to the same effect, and it not appearing that there was, he said it was plain what must be done in this case: For he looked upon the *offer* made by the underwriter's bill in equity to be the same thing as if the money had been *actually* brought into court in the present cause: Therefore the verdict for the plaintiff was set aside, and a verdict entered for the defendant.

It has been said, however, of this case, " that a trial being had under a decree of the court of Chancery, and the insurer having there made an offer of returning the premium, the court of King's Bench considered the offer in the same light as if he had paid the money into court, and therefore the question *remained undecided* (*a*). But, from the mode of disposing of this case, it is plain that, if the underwriter had not done what was deemed equivalent to bringing the money into court, there would have been a verdict against him for the premium. The court, therefore, clearly decided that the insured was entitled to a return of premium. And this decision had the more weight as it may be fairly concluded, from the

(*a*) ***Park*** in index tit. ***Return of Premium.***

gross

grofs mifconduct of the infured, and from the expedient adopted by the court to ouft him of the cofts at law, that this point was decided in his favour with much reluctance.

But the courts now hold a contrary doctrine.

But, be that as it may, Lord *Mansfield*, upon better reflection, faw at length, the impolicy, not to fay injuftice, of permitting the infured to take his chance of defrauding the underwriters, without the rifk of lofing his premium.—Therefore, where an action was brought on a policy for a total lofs, and it appeared to the fatisfaction of the jury, that the plaintiff had given the order to his broker to get the infurance effected, after he had received information of the lofs of the fhip, the jury found a verdict for the defendant; and Lord *Mansfield*, who tried the caufe, faid the fraud was fo grofs, that the plaintiff ought not to recover the premium from the underwriters.

Tyler v. *Horn*, at N. P. after Hil. 1785, *Park*, 418.

The fraud was certainly very grofs in this cafe, but not more grofs than in each of the three foregoing cafes, which we have cited.

Chapman and others, affignees of *Kennet* v. *Frafer*, B. R. Tr. 33 G. III.

But this important queftion has been fince finally fettled in a cafe which came before the court of King's Bench, and where the fraud had been committed, not by the infured himfelf, but by his agent; and the whole court were of opinion that, in all cafes of *actual fraud*, on the part of the infured, committed either by himfelf or his agent, the underwriter fhall retain the premium.

Sect. II.

Where the Rifk has not been commenced.

Foreign authors deny that the infured can diffolve the contract, and demand a return of premium.

All the foreign authors agree that infurance is a conditional contract, that the rifk is of the effence of it, and that the premium is the price of the rifk to be run: And yet, many of them hold that the infured is not permitted to diffolve the contract by his own act; and therefore if he relinquifh the intended voyage, the infurer is not

not bound to return the premium, and that he has a right to demand it, if it has not been already paid (*a*).—They except only the case where it becomes impossible for the insured to ship the goods, or to cause the ship to proceed on her voyage (*b*).

But the rules which prevail in *Holland* and *France* are more conformable to the nature of the contract of insurance. In *Holland*, if the goods insured should not be shipped, or should appear to be of less value than the sum insured, the insured may, in the one case, demand a return of the whole premium, in the other, a return for what is over-insured (*c*).—In *France*, if a stop be put to the voyage before the ship sails, *even by the act of the insured*, **In *Holland* and *France*, the law is different.**

(*a*) *An assecurator teneatur restituere pretium, eò quod in navi non fuerunt merces? Videbatur teneri assecurator ad restitutionem pretii recepti ob causam illius periculi; tamen in contrarium est veritas, quòd non solum non teneatur pretium restituere, imo possit petere illud; et ratio est, quia licet emptio periculi non teneat in præjudicium promissoris, tamen in ejus favorem, et in præjudicium, assecurati falsa assertio bene tenet. Sic etiam quia illa causa cessat, facto domini mercium, eò quod nullas merces misit in navem, et non facto assecuratoris, per quem non stetit.* Roccus, *h. t. not.* 11, 13, 14, 82, 88; *vid.* Santerna, *part.* 3. *n.* 19, 20, 22; Straccha *gl.* 6. Casaregis, *disc.* 1, *n.* 53, 58.——(*b*) *In casibus in quibus impeditur navigatio, putâ si navis sit combusta in portu, vel destructa, vel rex eam capiat pro necessitatibus publicis, et impeditur conditio assecurationis: quia tunc non possit imputari conditionis defectus magis uni, quam alteri parti, nullus tenebitur; et pretium periculi non potest peti, et solutum repetitur, quasi causâ non secutâ.* Roccus, *h. t, not.* 15, 56.—*Si, ex aliquo impedimento, assecuratus non potuisset merces suas onerare, tunc contractus assecurationis locum non haberet, ita ut si pretium assecurationis fuisset solutum, repeti certo poterit per assecuratum.* Casaregis *disc.* 1, *n.* 182, *disc.* 62, *n.* 4. Vid. *Le Guidon.* ch. 9. art. 16, which is nearly to the same effect. Vid. Ord. of *Antwerp*, art. 16. 2 *Magens* 27. *Locennius*, lib. 2, ch. 5, n. 16.——(*c*) Ord. of *Amsterdam*, art. 23, 2 *Mag.* 136.

the insurance becomes void, and the insurer shall return the premium (*a*).

In *England*, if the risk be not begun, to whatevercause this be owing, the premium shall be returned.

In *England*, the rule is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will of the insured, or to any other cause, except *fraud*, the premium shall be returned. The reason is, that a policy of insurance is a contract of indemnity; the underwriter receives the premium for running the risk of indemnifying the insured; and therefore, if he run no risk, to whatever cause, except fraud, this may be imputable, the consideration for which the premium was paid to him fails, and he ought to return it (*b*).

Where the policy is void, and there is no fraud imputable to the plaintiff, he is entitled to a return of premium.

If the contract be void, on account of a non-compliance with any warranty, express or implied; as if the ship do not sail on the day prescribed, or do not depart with convoy, or be not sea-worthy, and there be no fraud imputable to the insured, he shall be entitled to a return of premium; because the contract never attached, and the risk, therefore, never commenced. In such case, it is always advisable for the defendant, in an action on the policy, to bring the premium into court; otherwise the insured will have the advantage of trying the question on the validity of the contract, without the peril of costs; for, at the worst, he will be sure of a verdict for the premium (*c*). And it is not unusual when the jury have brought in their verdict for the defendant, on the only question submitted to them, for the plaintiff's counsel to claim a verdict for the premium, upon the count for money had and received.

When the plaintiff is entitled to a return of premium, he may claim a verdict for it, even after the jury have delivered their verdict for the defendant, on the principal question.

Indeed it has been the constant practice, for the plaintiff's counsel to abstain from any mention of the premium, where he means to claim a loss; because, by setting up a demand for the premium, he confesses a *doubt*, at least, of his being able to sustain his principal claim; and throwing out such a doubt, in a case already, perhaps,

(*a*) Ord. of *Louis* XIV. h. t. art. 37. Vid. *Emerig*. tom. 2, p. 154. *Pothier*, h. t. n. 178, 179. —— (*b*) Per Lord *Mansfield*, in *Tyrie* v. *Fletcher*, *Cowp*. 668. ——(*c*) Vid. inf. ch. 16. § 4.

doubtful,

doubtful, may raise a prejudice very injurious to his client's interest. And it may be said, moreover, in favour of this practice, that the defendant may come prepared to dispute the plaintiff's claim to a return of premium, and may prove fraud, which will not be inconsistent with any other defence he may have to make; whereas it often happens that the plaintiff's claim to a return of premium rests on the very case made by the the defendant (*a*).

But the court will not, on setting aside a verdict for a loss, substitute a verdict for the premium.

If the question of return of premium be not agitated at the trial, and a verdict be taken for the plaintiff for the loss, subject to the opinion of the court upon any point that may be reserved, and that point be decided against the plaintiff; it will then be too late to set up his claim to a verdict for the premium; for the court cannot find a new verdict, or substitute any other sum in lieu of that which the jury gave in damages (*b*).

Where the voyage and premium are divisible, and any part not begun, the premium for that part shall be returned.

If the insurance be upon a voyage which is divisible into several distinct risks, which are, in effect, several distinct voyages, the premium may be apportioned according to these several risks; and in case one or more of those risks should not have been commenced, the proportion of premium applicable to those parts shall be returned.

Stephenson v. Snow, 3 *Bur.* 1237.

A ship is insured at and from *London* to *Halifax*, warranted to depart with convoy from *Portsmouth*, at five guineas *per cent.* On her arrival at *Portsmouth*, she finds the convoy gone. Notice of this is immediately given to the insurers:—The premium shall be apportioned.

Thus:—A ship was insured, 'At five guineas *per* '*cent.* lost or not lost, at and from *London* to *Halifax*, 'warranted to depart with convoy from *Portsmouth* for 'the voyage.'—Before the ship arrived at *Portsmouth*, the convoy was gone. Notice of this was immediately given to the underwriters, who were desired, either to make the long insurance, or return part of the premium. They refused, and the insured brought an action to recover a part of the premium. At the trial, a case was reserved for the opinion of the court, stating the above facts, and also stating, that the jury found that the usual and set-

(*a*) Vid. *Penson* v. *Lee*, 2 *Bos.* & *Pul.* 330, in which this question was very much debated.—— (*b*) R. *Nesbit* v. *Whitmore*, 1 *East* 97, n.

tled

tled premium from *London* to *Portsmouth* was one and a half *per cent.* which the plaintiff offered to allow the defendant to retain; and that it was usual for the underwriters, in such cases, to return part of the premium: But the *quantum* was uncertain, and must in its nature be so; because it depended upon uncertain circumstances.—Upon this case, the court were unanimously of opinion that the plaintiff was entitled to recover.—Lord *Mansfield* said,—"These contracts are to be taken with great latitude: The strict letter is not so much to be regarded as the object and intention of the parties. Equity implies a condition that the insurer shall not receive the price of running a risk, if he run none. The premium is without consideration, as to the voyage from *Portsmouth* to *Halifax*; and then this case is within the general principle of actions for money had and received. I do not go upon the usage, which is only that, in like cases, a *part* of the premium is returned, without ascertaining *what* part. If the risk be not run, though it be by the neglect, or even the *fault*, of the insured, yet the insurer shall not retain the premium. It has been objected that the voyage being begun, and part of the risk already run, the premium cannot be apportioned: But I can see no force in this. This is not a contract so entire that there can be no apportionment: For there are two parts in it, and the premium may be divided into two distinct parts relative, as it were, to two distinct voyages. The practice shews that it has been usual, in such cases, to return a part of the premium, though the *quantum* be not ascertained: And, indeed, the quantum must vary as circumstances vary. But though the *quantum* has not been ascertained; yet the principle is agreeable to the general sense of mankind."—Mr. Justice *Denison*, and Mr. Justice *Foster*, concurred in this opinion.—Mr. Justice *Wilmot* said,—"The usage to return a part of the premium, in such cases, is a strong proof of the equity of the thing; and nothing can be more just and reasonable. If the risk be once begun, the insured shall not deviate or return back, and then say, I will go no further under this contract, but will have my premium returned. Upon this policy, there are two distinct points of time, in effect two voyages,

ages, which were clearly in the contemplation of the parties; and only one of the two voyages was made, the other was not at all entered upon, nor was the risk ever begun (*a*)."

In the following case, though the facts did not enable the court to pronounce any definitive judgment upon this point; yet, in sending it back to a new trial, an opinion was delivered which tends to strengthen the authority of the above decision.

Rothwell v. Cooke, 1 *Bos.* & *Pul.* 172.

A ship is insured from *Hull* to *Bilboa*, warranted to depart from *England* with convoy. The voyages from *Hull* to *Portsmouth*, the place of rendezvous, and from thence to *Bilboa*, may be considered as distinct; and in case the ship fails without convoy, and is taken, the premium may be apportioned, and a part returned.

An insurance was made on the ship *Manning*, 'At 'and from *Hull* to *Bilbõa*, warranted to depart from *Eng-*'*land* with convoy.'—The ship sailed from *Hull* to *Portsmouth*, and from thence departed with convoy; but this not being direct for *Bilboa*, she left it, and was afterwards captured.—In an action on this policy, upon the above facts coming out in evidence, the plaintiff would have been nonsuited; but his counsel insisted that he was entitled to a return of premium; and there being a count in the declaration for money had and received, and no money paid into court, a verdict was given for the plaintiff for the whole premium.—Upon a motion to set aside this verdict and enter a nonsuit, it was contended on the part of the defendant that, as the risk had commenced, the plaintiff could not be entitled to any return of premium.—On the part of the plaintiff, it was insisted that there were two distinct voyages in this case; the one from *Hull* to the place of rendezvous, and the other from thence to *Bilboa*, the port of discharge; that the risks were of different natures, one being without, the other with, convoy; and that, as the latter was never begun, the plaintiff must at all events be entitled to a return of a proportion of the premium on that account.—

(*a*) Vid. Lord *Mansfield*'s observations on this case, (*Cowp.* 669, inf. 655), in which he labours to vindicate the decision of it, by shewing that the grounds of it were, that the voyage was in fact *two voyages*, and that the contract comprised *two distinct conditions*. Vid. also the observations on this and the other cases on this point. 1 *Bos.* & *Pul.* 174.

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The court directed the verdict to be set aside, and granted a new trial, being of opinion that if the underwiters were not entitled to retain the whole premium, yet, having ran the risk from *Hull* to *Portsmouth*, they were at least entitled to retain a proportion of it, if, upon a further investigation, it should turn out that the voyage was divisible, and that the premium in such cases had ever been apportioned (*a*).

Yet, upon an insurance "*at and from*" a place, the risk is not divisible.

Yet, where an insurance is made on a ship, '*At and from*' her port of departure, and warranted to sail on or before a given day, and the ship does not sail within the time required by the warranty, by which the insurer is discharged; it has been holden that the risk at and from the port of departure is entire, and not divisible into two distinct risks, and that, therefore, the premium cannot be apportioned, so as to entitle the insured to any return.

Meyer v. *Gregson*, B. R. *East* 24 G. III. MS.

A ship is insured "*at and from Jamaica* to *Liverpool*, warranted to sail on or before the first of *August*; premium 20 guineas *per cent.* to return 8 guineas if she sailed with convoy." She did not sail till *September*:—The insured shall only be entitled to 8 guineas *per cent.* for convoy, and not to an apportionment of the rest of the premium.

Thus:—A ship was insured '' At and from *Jamaica* to '*Liverpool*, warranted to sail on or before the first of '*August*; premium 20 guineas *per cent.* to return 8, *if* '*she sailed with convoy.*'—The ship did not sail till *September*, and was lost in the voyage.'—The warranty, as to the time of sailing, not being complied with, the underwriters were discharged from the risk after the first of *August*, and an action was brought by the insured for a return of premium.—The defendant, who was an underwriter for 100l., paid 8 guineas into court, being the sum to be returned, if the ship sailed with convoy.—The jury apportioned the premium, and gave 8 guineas more for the risk from *Jamaica* to *Liverpool*; which they considered as not having been commenced; thus allowing 4 guineas for the risk "*at Jamaica.*"—The defendant moved to set aside the verdict, and enter a nonsuit, upon the ground that he risk was entire, the premium entire, and the voyage indivisible.—Lord *Mansfield*, Mr. Justice *Ashurst*, and Mr. Justice *Buller*, (against the opinion of Mr. Justice *Willes*, who thought with the jury, that the premium should be apportioned), determined

(*a*) This, upon memory, seems to be the result of what was done by the court, though not fully expressed in the printed report.

that

that the insured was not entitled to recover more than had been paid into court.—Lord *Mansfield* said,—" It would be endless to go into an enquiry about the value of the risk " *at Jamaica* ;" which is different at different sides of the island: The parties divided the risk, as to convoy; for 8 guineas were to be returned if the ship sailed with convoy. Independent of that, it was an insurance " At and from *Jamaica* to *London*," at 12 guineas *per cent.* with an absolute warranty to sail " on or before the 1st of *August*," and nothing is said from whence it can be inferred that it was meant that there should be two risks, or by which the risk at *Jamaica* could be distinctly estimated (*a*)." — Mr. Justice *Buller* said,—" As the parties have not considered it as two risks, nor estimated the risk " *at Jamaica*," neither the court or jury have any right to do it for them. In all the insurances from *Jamaica*, the policy runs " *at and from* ;" and though in many instances, the voyage has not been commenced, yet there never was an idea of any part of the premium being returned; and no usage to do so has been found by the jury."

Upon an insurance *at and from* a place, an usage should be proved to warrant a division of the risk.

In a subsequent term the following case came before the same court; and though the point was not decided by the judges, yet Lord *Mansfield*, in directing a new trial, laid down the principle, which he conceived ought to govern these cases, in terms which seem more reconcileable to the case of *Stevenson* v. *Snow* (*b*) than to the last cited case of *Meyer* v. *Gregson*.

Gale v. *Machell*, B. R. *Last.* 25 G. III.

A ship insured at and from *Jamaica* to *London*, warranted to sail with convoy, arrives too late at the place of rendezvous for the convoy, but follows and overtakes them:—Whether there shall be a return of premium.

A ship was insured ' *At and from* any port or ports ' in *Jamaica* to *London*, following and commencing from

(*a*) Lord *Mansfield*, in delivering his opinion in the case of *Tyrie* v. *Fletcher*, *Cowp.* 670, inf. 662. seems to have entertained a different sentiment on this point. He then inclined to think that if the words of the policy were " *at and from*, provided the ship shall sail on or before the 1st of *August*," it would fall within the reasoning of *Stevenson* v. *Snow*, and that there would then be two parts, or contracts, of insurance, with distinct conditions. But this can only be considered as an extra-judicial opinion expressed very doubtfully.——(*b*) Sup. 655.

'her first arrival there; warranted to sail with convoy 'for the voyage, from the place of rendezvous.'—The ship did not get to the place of rendezvous in time to sail with the convoy,—but sailed after, and overtook them; so that the warranty was not complied with, and the underwriters were discharged from the time of the ship's sailing.—The insured brought an action to recover back a part of the premium for the voyage *from Jamaica*.—At the trial, an usage seemed to have been proved, that when the ship was not out of the port of *Jamaica*, the allowance was one-half *per cent.* In other cases it was arbitrary, and two or three *per cent.* was reasonable. There was a verdict for the plaintiff. Upon a motion for a new trial, the counsel differed as to the facts that were in evidence, and the cause was sent back to a new trial, without the question of law having been much discussed.—Lord *Mansfield*, however, said, that where there is a *contingency* in the voyage, the risk may be divided. That the reason why there are not two polices in such cases was, that the risk "*at*," is capable of exact computation. He said the former cases upon this point were contradictory.

Where there is a contingency in the voyage, the risk may be divided.

In the same term the following case was determined: And though the judges seem to have laid great stress on the *usage* found by the jury, to return the premium, deducting one half *per cent.* upon insurances, at and from *Jamaica*, with a warranty to depart with convoy, or to sail on or before a given day, and the warranty is not complied with; and though it is distinguished from the case of *Meyer* v. *Gregson* on this ground; yet it cannot be denied that the authority of that case is greatly shaken by it.

Long v. *Allen*, B. R. *East* 25 G. III MS.

Goods are insured "At and from *Jamaica* to *London*, warranted to depart with convoy before the 1st of *August*." The ship sails before the

That was the case of an insurance on goods, 'At and 'from *Jamaica* to *London*, warranted to depart with con-'voy, for the voyage, and to sail on or before the first 'of *August*, at a premium of 12 guineas *per cent.*'—The ship sailed from *Jamaica* to *London* on the 31st of *July*, but without any convoy, whereby the underwriters became discharged from the remaining risk.—An action was brought for a return of premium.—The jury found a verdict

a verdict for the plaintiff subject to the opinion of the court on the above facts; in addition to which, they found 'that it was the constant and invariable usage in 'insurances, at and from *Jamaica* to *London*, *warranted* '*to depart with convoy, or, to sail on or before a certain day*, to 'return the premium, deducting one half *per cent.* if the 'ship sailed without convoy, or after the day prescribed.' —Upon this case, the court determined that the plaintiff was entitled to recover according to the usage proved.—Lord *Mansfield* said,—"The law is clear, that if the risk be commenced, there shall be no return of premium. Hence questions arise of *distinct* risks, insured by one policy. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned against them. But where an express usage is found by the jury, the difficulty is cured."—Mr. Justice *Buller* said;—"The counsel for the defendant did right to make the chief question, whether any evidence of this usage ought to have been received. In mercantile cases, from Lord *Holt*'s time, and in policies of insurance in particular, a great latitude of construction, as to usage, has been admitted. By usage, places come within the policy, which are not within the words: Usage explains, and even controuls the policy. The usage here found by the jury is universal; and though, in some cases, one half *per cent.* is a small premium for the risk *at*; yet the underwriters are aware that it is so, and no inconvenience can result from it. In *Meyer* v. *Gregson*, no usage was found."

day, but without convoy. There is an *usage*, that in such cases the premium shall be returned, deducting ½ *per cent.* for the risk *at*.—The insured shall recover the residue of his premium.

But if the risk be entire, and be once commenced, it is a general rule that there shall be no return of premium. And the shortness of the time when the thing insured was put in risk affords no ground for a return of any part of the premium; for it becomes the absolute property of the insurer, the moment the risk commences, though it should cease the moment after. This is one of the favourable circumstances which compensate the insuer for the accidents to which he is exposed. It is impossible to apportion the premium to the duration of the risk, which

But if the risk be entire and be once commenced, there shall be no return.

may be greater in the first hour than in the rest of the voyage (*a*). Therefore if the ship get under weigh, and sail on the voyage insured, the premium is acquired, though she return the same instant and wholly abandon the voyage. So if the ship deviate from the voyage insured the next hour after she sails; though this discharges the insurers, yet, the risk having been commenced, there shall be no apportionment, or return of any part of the premium, in respect of the diminution of the risk.— Though the voyage be to several different places, and consist of several distinct parts; yet, if in fact it be *one entire risk*, for *one entire premium*, and not several distinct risks, there shall be no apportionment, or return of the premium, on account of any contingency which puts an end to the contract, before the commencement of any part of the voyage insured (*b*).

Berman v. Woodbridge Doug. 751.

A ship is insured "At and from *A.* to *B.* during her stay at *B.* and from thence to her port of discharge at *C.* and at and from *C.* back to *A.*" The ship is taken before she arrives at *C*:—There shall be no return of premium for the voyage from *C.* to *A.* this being one entire risk and one voyage.

Thus:—An insurance was made on a *French* ship and her cargo, 'At and from *Honfleur* to the coast of *Angola*, 'during her stay and trade there; at and from thence 'to her port or ports of discharge in *St. Domingo*; and at 'and from *St. Domingo* back to *Honfleur*; *at a premium* '*of eleven per cent.*'—The ship sailed to *Angola*, and from thence, after staying some time there, to the *West Indies*. On her way from *Angola*, she put into *Cayenne*, on the coast of *America*, and from thence went to *Martinico*, confessedly out of her course to *St. Domingo*, where the captain was obliged to dispose of his cargo. The ship sailed for *Honfleur*; but was taken by a privateer on her voyage thither.—As the deviation discharged the underwriters, the only question was, whether there should be a return of part of the premium.—On the part of the plaintiff it was contended, that the voyage insured con-

(*a*) Vid. *Emerig*, tom. 1, p. 62, 63. *Pothier*, h. t. n. 179.

(*b*) By the ordinance of *Louis* XIV. h. t. art. 6, if an insurance be made on the outward and homeward voyage, at an entire premium, and the ship arrive at her outward port of destination, but never returns, the insurer shall return one third of the premium.

sisted

ſiſted of three diſtinct parts or voyages; viz. from *Honfleur* to *Angola*, from *Angola* to *St. Domingo*, and from *St. Domingo* back to *Honfleur*; and that, as this laſt voyage had never been commenced, the premium ought to be apportioned, and the part of it returned which was paid to inſure the riſk from *St. Domingo* to *Honfleur*.—Bnt the jury, upon that point, were clear that there ought to be no return.—Lord *Mansfield*, who tried the cauſe, upon turning the queſtion in his mind, entertained ſome doubts upon it, and deſired that a new trial might be moved for; which being done, the court, upon great conſideration, determined that this was one voyage, and one entire riſk; and that there could be no return of premium.--- His lordſhip, in delivering the opinion of the court on this point, ſaid;---"On the fulleſt conſideration, and after looking into all the caſes, (though my opinion has fluctuated), we are now all clear that there ought not to be any any return. The queſtion depends upon this: Whether the policy be upon one entire riſk on one voyage, or whether it is to be ſplit into ſix different riſks; for by ſplitting the words, and taking *at* and *from*, ſeparately, it will make ſix. The principles are clear. When the riſk has never begun, there muſt be a return of premium; and if the voyages in this caſe are diſtinct, the voyage from *St. Domingo* to *Honfleur* never began. On the other hand, if the riſk have once begun, you cannot ſever it, and apportion the premium. In an inſurance upon a life, with the common exception of *ſuicide and the hands, of juſtice*; if the party commit ſuicide, or be executed in twenty-four hours, there ſhall be no return. The caſe is the ſame if a voyage inſured be once begun. Is this one entire riſk? The inſured and inſurers conſider the premium as an entire ſum for the whole, without diviſion. It is eſtimated on the whole at eleven *per cent*, and, which is extremely material, there is no where any contingency at any period, out or home, mentioned in the policy, which happening, or not happening, is to put an end to the inſurance. The argument muſt be, that if the ſhip had been taken between *Honfleur* and *Angola*, there muſt have been a return. By an implied warranty, every ſhip

The premium being entire, is a proof that the riſk is entire.

must be sea-worty when she sails on the voyage insured; but she is not necessarily to continue so throughout the voyage; so that, if this be one entire voyage, if the ship was sea-worthy when she left *Honfleur*, the underwriters would have been liable though she had not been so at *Angola*, &c. but according to the construction contended for on the part of the plaintiff, she must have been sea-worthy, not only at her departure from *Honfleur*, but also when she sailed from *Angola*, and when she sailed from *St. Domingo*. The cases of *Stevenson* v. *Snow* (a), and *Bond* v. *Nutt* (b), were quite different from this. They depended upon this, that there was a contingency specified in the policy, upon the not happening of which the insurance would cease. In *Stevenson* v. *Snow*, it depended on the contingency of the ship sailing with convoy from *Portsmouth*, whether there should be an insurance from that place or not. This necessarily divided the risk and made two voyages. In *Bond* v. *Nutt*, it was held that there were two risks upon the same principle. "At *Jamaica*," was one. The other, viz. "From *Jamaica*," depended on the contingency of the ship having sailed "*on or before the first of August*." That was a condition precedent to the insurance on the voyage *from Jamaica to London*. The two cases of *Tyrie* v. *Fletcher*, and *Loraine* v. *Thomlinson*, are very strong; for, if you could apportion the premium in any case, it would be in insurances *on time*."

Where the insurance is for a *term*, and the premium is entire, if the risk be begun, there shall be no return.

So, where the insurance is for a term specified in the policy, and for one entire premium; if the risk be begun, and an event happen immediately after which determines the contract, there shall be no return of premium.

Tyrie v. *Fletcher*, Cowp. 666.

Thus:—A ship was insured, 'At and from *London*, 'to any port or place wheresoever or whatsoever, for '*twelve months*, from the 19th of *August* 1776, warranted free from capture or seizure by the *Americans*.' The premium was 9l. *per cent*..—The ship was taken by an *American* privateer, about *two months* after she failed.

(a) Sup. 655.——(b) Sup. 353.

The

—The insured brought an action to recover a proportion of the premium for the residue of the time. The court determined that the risk was *entire*; and, having been once begun, there could be no return of any part of the premium. Lord *Mansfield* said,—" This case is stript of every authority. There is no case, or practice, in point; and therefore we must argue from general principles applicable to policies of insurance. And I take it, there are two general rules established, applicable to this question. The *first* is, that where the risk has not been begun, whether this be owing to the fault, pleasure, or will, of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity; the underwriter receives a premium for running the risk of indemnifying the insured; and, to whatever cause it be owing, if he do not run the risk, the consideration, for which the premium was put into his hands, fails, and therefore he ought to return it. Another rule is, that if the risk has once commenced, there shall be no apportionment or return of premium afterwards: For though the premium is estimated, and the risk depends upon the nature and length of the voyage; yet, if it was commenced, though it be only for 24 hours or less, the risk is run; the contract is for the entire risk; and no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the *East Indies*, agreeably to the terms of the policy in this case, and had been taken 24 hours after the risk was begun, by an *American* captor, there is not a colour to say that there should have been a return of premium. So much, then, is clear; and indeed perfectly agreeable to the ground of determination in *Stevenson* v. *Snow* (*a*). For, in that case, the intention of the parties, the nature of the contract, the consequences of it, spoke manifestly *two* insurances, and a *division* between them. The first

(*a*) Sup. 655.

object

object of the insurance was from *London* to *Halifax*: But if the ship did not depart from *Portsmouth* with the convoy specified, then there was to be no contract from *Portsmouth* to *Halifax*. The parties, then, have said, 'We 'make a contract from *London* to *Halifax*; but, on a cer'tain contingency, it shall only be a contract from *Lon*'*don* to *Portsmouth*.' That contingency not happening, reduces it, in fact, to a contract from *London* to *Portsmouth* only. The whole argument turned upon that distinction, and all the judges, in delivering their opinions, lay the stress upon the contract comprising *two distinct conditions*, and considering the voyage as being, in fact, *two voyages*: And this was the equitable way of considering it; for though it was at first consolidated by the parties, there was a defeazance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly on that ground; but that was the opinion of the court. There was an usage also found by the jury in that case, that it was *customary* to return a proportionable part of the premium in such cases, but they could not say *what* part. The court rejected this, as a void *usage*, for the uncertainty; but they argue from it, that there being such a custom, plainly shewed the general sense of the merchants, as to the propriety of returning a part of the premium in such cases: And there can be no doubt of the reasonableness of the thing. There has been an instance put where the measure is by *time*, which seems to me to be very strong, and apposite to the present case; and that is, an insurance upon a man's life for twelve months: There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the insured would demand double the premium for *two* years that he would take to insure the same life for *one* year only. In such policies there is a general exception against suicide.—If the person put an end to his life the next day, or a month after, or at any other period within the twelve months, there never was an idea that part of the premium should be returned. A case of general practice was put by Mr. *Dunning*, where the words of the policy are, "At and from, *provided* the ship "sails

If a man's life be insured for 12 months, with an exception of suicide, and he kill himself the next day; there shall no return.

"sails on or before the first of *August* (*a*);" and Mr. *Wallace* considers, in that case, that the whole policy would depend upon the ship's sailing before the stated day. I do not think so. On the contrary, I think, with Mr. *Dunning*, that cannot be. A loss in port, *before* the day appointed for the ship's departure, can never be coupled with a contingency *after* the day: But if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of *Stevenson* v. *Snow*; and that there were two parts, or contracts, of insurance, with distinct conditions: The *first* is, 'I insure the ship in port, against loss before the 'first of *August*:' And, *secondly*; 'If she should not be lost 'in port, I insure her then, during her voyage, from the 'first of *August*, till she reach the port specified in the po-'licy.' The loss in port must happen before the risk upon the voyage could commence; and, *vice versa*, the risk in port must cease the moment the risk upon the voyage began (*b*).—Let us see then, what the agreement of the parties is, in the present case. They might have insured from two months to two months; or in any less or greater proportion, if they had thought proper so to do: But the fact is, that they have made no *division of time* at all; but the contract entered into was one entire contract from the 19th of *August* 1776, to the 19th of *August* 1777; which is the same as if it had been expressly said by the *insured*; 'If 'you, the underwriter, will insure me for 12 months, I

If an insurance be '*at and from*,' *provided* the ship sails on or before such a day:—Whether this be two risks, or only one entire risk.

(*a*) It must be owned that the case thus put has much of subtilty in it. One part of it seems repugnant to the other. Mr. *Wallace* appears to have given it the best anwer it would admit of. The word *provided* makes the sailing on or before the first of *August* a *condition* upon which the contract is to take effect; and if this be so, the word "*at*" in the policy is quite nugatory.——(*b*) This extrajudicial opinion, seems to have been rather hastily delivered, or perhaps, not very accurately reported. See the case of *Meyer* v. *Gregson*, sup. 658, which seems to be nearly the case put by Mr. *Dunning*, and in which Lord *Mansfield* and the rest of the judges of the *King's Bench* decided that there should be no return of premium.

'will

'will give you an entire sum; but I will not have any ap-'pointment.'—The ship sails, and the underwriter runs the risk for *two* months; no part of the premium, then, shall be returned.—I cannot say, if there had been a recapture before the expiration of the 12 months, that the policy would not have revived."

Even if the premium for a year be computed at *so much per month*; yet, being a gross sum, it is not a monthly insurance.

In the foregoing case, Lord *Mansfield* intimated an opinion that where the premium is entire, it is one proof that the risk is meant to be entire. In the following case, the court of *King's Bench* carried this idea still farther, and decided that if, upon an insurance for a year, a gross premium be given; but it is expressed in the policy to be *at so much per cent. per month*; this shall be deemed only a mode of computing the gross sum, and does not make the contract a monthly insurance.

Loraine v. *Tomlinson, Doug.* 564.

A ship insured against *capture* for 12 months, is *lost in a storm* within two months. The premium is 9 *per cent.* and expressed in the policy to be at the rate of 15s. *per month*; yet there shall be no return.

An insurance was made on a ship against *capture* only, *for twelve months*, in the coasting trade. The plaintiff underwrote 200l. In the body of the policy it was stated, 'That the insurers confessed themselves paid the consider-'ation due to them by the insured, *at and after the rate of* '15s. *per cent. per month*.' At the bottom opposite the plaintiff's subscription, was written, 'Premium received 'the 15th of *March* 1779; and on the back was indorsed, '—*Newcastle* 15th *March* 1779, Mr. *J. G. Thomlinson*, on 'his ship *Chollerford*, himself master, *for twelve months*, in 'the coasting trade, at and between *Leith* and the *Isle of* '*Wight*, beginning the 13th of *March* 1779, and ending 'the 12th of *March* 1780.'—The premium was, in fact, not paid, it being the usage in *Newcastle* not to pay the premiums at the time of making insurances, but at certain times afterwards.—The ship was *lost in a storm* within the first two months; and the insured tendered the underwriter 3l. as the premium for two months.—The underwriter brought his action against the insured to recover the whole premium of 18l. The defendant pleaded the tender, and paid the 3l. into court.—The court were clearly of opinion that the plaintiff was entitled to recover the whole premium.—Lord *Mansfield* said,—"This is a mere question of construction, on the face of the instrument, and therefore, parol evidence ought not to have

have been admitted to explain it. It is an inſurance for 12 months, for one groſs ſum of 18l. They have calculated this ſum to be at the rate of 15s. *per* month. But what was to be paid down? Not 15s. for the firſt month, and ſo from month to month; but 18l. at once. Two caſes have been mentioned. *Stevenſon* v. *Snow* (*a*), was decided on the ground of there being two voyages. *Tyrie* v. *Fletcher* (*b*) is directly in point againſt the defendant." He then repeated the two rules laid down by himſelf in this laſt caſe.

Sect. III.

Upon the Performance of ſome Stipulation.

IT is frequently agreed between the parties that, upon the happening of a certain event, or the performance of ſome ſtipulation, the inſured ſhall return a part of the premium; and clauſes to this effect are then inſerted in the policy. If, in ſuch caſe, the event do happen, or the thing ſtipulated be performed, the inſured ſhall be entitled to the return of premium agreed upon.

Where part is to be returned on the performance of ſome ſtipulation, this ſhall be returned though the inſurer be obliged to pay a partial loſs.

In time of war it is frequently ſtipulated that a part of the premium ſhall be returned, "*if the ſhip ſail with* "*convoy and arrive.*" And upon the conſtruction of this clauſe, ſeveral important queſtions have ariſen.

If the ſtipulation be for a mere ſailing with convoy, without ſpecifying to any particular place, a ſailing with convoy from one port to another in the ſame country, for the purpoſe of there joining convoy for the voyage, will be a ſailing with convoy within the meaning of the ſtipulation.

Thus:—The ſhip *Ceres* was inſured, 'At and from 'Oporto to *Lynn*, with liberty to touch and ſtay at any 'ports or places on the coaſt of *Portugal*, to join convoy, 'particularly at *Liſbon*; at 12 guineas *per cent.*, to return

Audley v. *Duff*, 2 *Boſ.* & *Pul.* 111.

A ſhip is inſured at 12 guineas *per cent.* to return 6l. if ſhe ſail with convoy from the coaſt of *Portugal*, and arrive. She ſails under con-

(*a*) Sup. 655.——(*b*) Sup. 662.

 '6l.

voy from *Oporto* to *Lisbon*, the general rendezvous, in order to sail from thence with the whole fleet. The ships, in their passage from *Oporto* to *Lisbon*, being dispersed, the ship insured runs for *England* and arrives: —This is a sailing with convoy, so as to entitle the insured to the stipulated return.

'6l. if she sailed with convoy from the coast of *Portugal* 'and arrived.'—In an action to recover this 6l. *per cent.* of the premium, it appeared that, at the time the *Ceres* was to sail, there were many merchant ships collected in the different ports of *Portugal*, and Lord *St. Vincent*, the commander of that station, being unable to afford separate convoys for *England*, from each port in *Portugal*, sent a cutter and a sloop to fetch the trade from *Oporto* to *Lisbon*, where they were to lie in the bay of *Doyras*, without entering the port of *Lisbon*, to avoid the *Lisbon* duties. From that place a convoy was appointed for the whole trade to *England*. The *Oporto* fleet in proceeding to *Lisbon*, being dispersed, lost the convoy, and the *Ceres*, then judging it for the best, ran for *England*, and arrived.—It was contended on the part of the defendant, that the *Ceres* never *left* the coast of *Portugal* with convoy.—Lord *Eldon*, who tried the cause, told the jury that, as the *Oporto* trade had put themselves under the convoy of the cutter and sloop which formed a part of the aggregate convoy for *England*, they had deprived themselves of all power of acting for themselves, and had therefore departed with convoy from the coast of *Portugal*. He added, that the liberty given by the policy to touch at other ports on the coast of *Portugal*, did not vary the inference of her being under convoy for *England* from the moment she received sailing instructions; and from that time the liberty so given was at an end. The jury, under this direction, found a verdict for the plaintiff.—Upon a motion to set this verdict aside, and enter a nonsuit, the court were clearly of opinion that the event had happened on which the plaintiff's title to a return of premium was to attach, and therefore that the verdict was right.—Lord *Eldon* said,—" It being unknown in *England* from what port or coast of *Portugal* the convoy would sail, the clause for a return of premium was to be adapted to the circumstances of the case. The departure with convoy might be from *Oporto*, or it might be from some other place. It became necessary, therefore, to introduce some expression, which extended to something more than a mere departure from *Oporto*. The fair interpretation of the agreement is, that the insured shall have the benefit

of

of the policy, though the ship should sail from *Oporto* without convoy; but that if she sailed from *Oporto*, which is on the coast of *Portugal*, with convoy, then there should be a return of premium."

The word *arrives* relates only to the *ship*, even in a policy on goods.

Upon the effect of the word "*arrives*," several cases have been determined. In the first of these, it was holden that this word relates to the arrival of the *ship*, and not to the arrival of the goods on board, even where the insurance is on the goods only.

Simond v. Boydell, Doug. 255.

Goods are insured from *Grenada* to *London*, at 18 guineas *per cent.* "to return "8l. *per cent.* if "sails with convoy and arrives."—The arrival of the *ship* is what is meant, and the ship having sailed with convoy, the insured is entitled to a return of 8l. *per cent.* on the sum insured, notwithstanding any partial loss on the goods.

Thus:—An insurance was made,—'At and from any 'port or ports in *Grenada* to *London*, at 18 guineas *per* '*cent. to return* 8l. *per cent.* if sails from any of the *West* '*India* islands, with convoy for the voyage, *and arrives*.' At the bottom of the policy there was written a declaration that it was on sugars, valued at 20l. *per* hogshead. The ship sailed with convoy within the time limited, having 51 hogsheads of sugars on board. She arrived safe in the *Downs*, where the convoy left her as usual. She afterwards struck on a sand bank near *Margate*, and 11 of the 51 casks of sugar were washed overboard, and the rest damaged. The ship was afterwards got off, and arrived safe in the port of *London*. The sugars saved were carried to *London* in other vessels, and the 40 hogsheads being sold, produced 340l. instead of 800l. their valuation in the policy. An action was brought against the underwriters for a return of premium.—The defendant paid into court 8l. *per cent.* on 340l. The plaintiffs insisted that they were entitled to have 8l. *per cent.* returned on the *valued price* of the whole 51 hogsheads. —At the trial, before Lord *Mansfield*, the plaintiffs had a verdict for their whole demand.—Upon a motion for a new trial, the principal question was upon the effect of the word "*arrives*."—For the plaintiff it was insisted that this word related only to the arrival of the *ship*; that, in policies of this sort, the intention is, that the underwriters shall take the war risk upon themselves; but that, if the vessel be protected by convoy from *that risk*, and actually arrive, they shall then return as much of the premium as was necessary to cover it.—On the other side, it was contended that, as the words of the policy must be applied to the subject matter of the insurance,

rance, which in this cafe was on the *goods*, not on the fhip, the return of premium could, at moft, be only on the value of the fugars which actually came to *London*; whereas, if the defendant muft pay the valued amount of the fugars loft, and the difference between the valued price and the actual produce of the fugars faved, and alfo return 8l. *per cent.* upon the whole, the infured would be confiderable gainers by the lofs.—The court determined that the arrival of the *fhip* was what was meant by the policy; and that the plaintiff was entitled to a return of full 8l. *per cent.* on the fum infured, notwithftanding the partial lofs on the goods.—Lord *Mansfield*, after obferving how very inattentive thofe who introduce additional claufes into policies are to their import, faid,—"I do not doubt, however, how we are to conftrue this policy. Dangers of the fea are the fame in peace and war: But war introduces hazards of another fort, depending on a variety of circumftances; fome known, others not, for which an additional premium muft be paid. Thofe hazards are diminifhed by the protection of convoy; and if the infured will warrant a departure with convoy, there is a diminution of the additional premium. If the infured will not warrant a departure with convoy, he pays the full premium; and in that cafe, the underwriter fays: "If it turn out that the fhip do depart with convoy, "I will return part of the premium." But a fhip may fail with convoy, and be feparated from it by a ftorm, or other accident, in a day or two, and lofe its protection. On a warranty to fail with convoy, that would not be a breach of the condition: But, to guard againft that, the infured adds, in policies of the prefent fort; "The "fhip muft not only fail with convoy, but fhe muft *arrive* "to entitle you to the return." The words, "*and arrives*" do not mean that the fhip fhall arrive in the company of the convoy; but only that fhe herfelf fhall arrive. If fhe do, that fhews, either that fhe had convoy the whole way, or did not want it. But, in the ftipulation for the return of premium, no regard is had by the parties to the condition of the goods, on the arrival of the fhip. The conftruction contended for by the defendant is *adding a comment longer than the text.* If it had been

How the ftipulation that a part of the premium fhall be returned, if the fhip fail with convoy, muft be underftood.

The words "*and arrives*" refer to the *fhip*, not to the goods infured.

been meant that no return ſhould be made unleſs all the "goods arrive ſafe, they would have ſaid; " If the ſhip arrive " *with all the goods*; or, *ſafely with all the goods.*" The total or partial loſs of the goods was the ſubject of the *indemnity*, and muſt be paid for by the underwriter. But as to the return of the additional premium; whether the goods arrive ſafe or not, makes no part of the queſtion. The ſingle principle which governs is, that, in the events that have happened, the war riſk has been rated too high.""

Aguilar and others v. *Rodgers*, 7 T. R. 421.

The inſurer on freight agrees to return part of the premium, "if the ſhip ſail with convoy and *arrive.*"—The ſhip having ſailed with convoy and arrived, the inſured ſhall have the return, though the ſhip being captured and recaptured, the underwriters were obliged to pay ſalvage.

So, where the freight of the ſhip *Jackſon* was inſured, 'At and from *Jamaica* to *London*, warranted to ſail on 'or before the 26th of *July* 1796, with convoy for the 'voyage, at a premium of 10 guineas *per cent. to return* '2l. *per cent.* if ſhe ſailed on or before the 1ſt of *July* '1796, and arrived.'—Afterwards, by a memorandum indorſed on the policy, on the 15th of *Auguſt* 1796, and ſigned by the underwriters, it was agreed, in conſideration of 10 guineas *per cent.* additional premium, that the warranty of ſailing with convoy ſhould be annulled, and the defendant undertook to return 10l. *per cent.* "*if the ſhip ſailed with convoy and arrived.*" The ſhip ſailed from *Jamaica* on the 26th of *July*, with convoy, but ſeparated in bad weather, and was captured on the 26th of *October*, recaptured on the 5th of *November*, and carried into *Cork*, where ſhe was delivered up to the owners, on paying 9l. 14s. 7d. *per cent.* for ſalvage. She afterwards arrived at the port of *London* with her cargo. In an action on the policy, with a count for a return of premium, the defendant paid into court 19l. 9s. 2d. the amount of the ſalvage on 200l. his ſubſcription.—The plaintiffs obtained a verdict for the premium, and, upon a motion to ſet it aſide, the court determined that, according to the true conſtruction of the memorandum, the inſured was entitled to the return of premium there ſtipulated.—Lord *Kenyon* ſaid,—" I agree with the defendant's counſel, that every arrival of the ſhip at her port of deſtination, would not be an arrival within the fair conſtruction of the memorandum; ſuch, for inſtance, as an arrival in the poſſeſſion of an enemy at a neutral port; or an arrival at her port in *England*, as the pro-

perty of other persons after a capture. But, in order to satisfy the memorandum, it should be an arrival at the destined port, *in the course of the voyage*; and, in this case, the ship did arrive at the port of *London*, in the course of her voyage. It is now too late to controvert the authority of *Hamilton* v. *Mendez* (*a*), even if we were disposed so to do, which I am not, where it was holden that though the insured may abandon on hearing of a capture, yet if they do not abandon, and the ship be afterwards recaptured, it must be considered as if she had never been out of the possession of the owners. It is 18 years since the case of *Simond* v. *Boydell* (*b*) was decided. That case must be well known in the commercial world; and if the parties in this case had intended to make an agreement different from that which the words used in this memorandum import, they would have added, after "*arrived*," the words "*safely from the* "*enemy*" or some others to that effect. But the words here used are not equivocal, and we ought not to depart from them. It would be attended with great mischief and inconvenience if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties. On the grammatical construction of the words, which is the safest rule to go by, I am of opinion that the verdict ought not to be set aside."

So, if the ship sail with convoy and arrive, this will entitle the insured to the stipulated return of premium, though the goods insured be afterwards lost, and the underwriters be obliged to pay a total loss.

Horncastle v. *Haworth*, before Sir *J. Mansfield*, C. J. at G. H. 26th *February* 1806.

The ship sails with convoy and arrives, but the goods insured are afterwards totally lost:—The insured is entitled to a return of premium, as well as to a total loss.

Thus: Goods were insured on board the *Marquis of Lansdown* from *London* to *Dominica*, at a premium of 8 guineas *per cent.* to return 4l. *per cent.* "*if sails with* "*convoy and arrives.*"—The ship sailed with convoy, and arrived on the 6th of *February* 1805, at the port of *Roseau* in *Dominica*, and began unloading, and continued till the 22d of *February*, when a *French* fleet arrived, and, amongst others, captured the *Marquis of Lansdown*, with the goods insured on board.—In an action on the policy,

(*a*) Sup. 572.——(*b*) Sup. 671.

the

the plaintiff claimed not only a total loſs by the capture, but alſo 4l. *per cent.* return of premium, the ſhip having ſailed with convoy and arrived.—Sir *James Mansfield*, C. J. who tried the cauſe, was at firſt of opinion that the the plaintiff was not entitled to any return of premium; but the above caſe of *Simond* v. *Boydell* (*a*) being cited, he yielded to the authority of it, and directed the jury to give the plaintiff the 4l. *per cent.* return of premium, together with the total loſs.

The words "*and arrives*" mean an arrival at the ſhip's ultimate deſtination.

If it be agreed to return different portions of the premium in caſe the ſhip ſail with convoy for different portions of the voyage, *and arrive*; this means an arrival at the ſhip's ultimate port of deſtination.

Kelner v. *Le Meſurier*, 4 *Eaſt* 396.

Policy on a ſhip from *Liſbon* to *Cadiz*, and from thence to *Fluſhing*, at 20 guineas *per cent.* to return 8*l.* for convoy from *Cadiz* to *England*, and 2*l.* more for convoy from *England* to *Fluſhing*, and *arrives*.—The ſhip arrives under convoy in *England*, where ſhe is captured.—The inſured is not entitled to a return of 8*l.* *per cent.* the ſhip never having arrived at *Fluſhing*.

As where a ſhip was inſured ' At and from *Liſbon* to ' *Cadiz*, and at and from thence to *Fluſhing*, at a pre- ' mium of 20 guineas *per cent.* to return 8l. *per cent.* if ' the ſhip ſailed from *Cadiz* with convoy for *England*, and ' 2l. *per cent.* more for convoy from *England* to *Fluſhing*; ' or 10l. *per cent.* if with convoy for the voyage, *and ar- ' rives*.'—The ſhip having ſailed from *Liſbon* to *Cadiz*, ſailed from thence under convoy for *England* and arrived, but was there ſeized and taken as prize. In an action upon the policy, one queſtion was, whether the inſured was entitled to a return of 8l. *per cent.* the ſhip having ſailed with convoy from *Cadiz* to *England*, and arrived there?—Upon this queſtion the court determined that no return of premium was demandable within the meaning of the policy, the ſhip never having arrived at *Fluſhing*, her ultimate port of deſtination.—The reaſon given for ths deciſion was, that the words "*and arrives*" annex a condition which over-rides and governs equally *all* the ſeveral ſtipulations for a return of premium, in the events of a ſailing with convoy for the different parts and ſubdiviſions of the voyage; and that, as the whole 10l. *per cent.* is made returnable upon a ſailing with convoy for each part of the voyage, and arriving at *Fluſhing*, there could be no reaſon why the 8l. and the 2l. *per cent.* ſhould be made reſpectively returnable on account of the mere ſailing with convoy for the

(*a*) Sup. 671.

refpective parts of the voyage, independently of the fame event of ultimate arrival; and efpecially when the underwriter could derive no benefit from fuch partial convoy, but would have a total lofs to pay.

If, before the fhip can fail with convoy, the underwriters be difcharged, the infured fhall be entitled to a return for convoy.

If it be ftipulated that there fhall be a return of part of the premium for failing with convoy and arrival, and, in confequence of the breach of fome warranty, or the non-performance of fome ftipulation, or of a deviation, the underwriters be difcharged before the fhip can fail with convoy, the infured fhall be entitled to the ftipulated return of premium; becaufe the difcharge of the underwriters is, to them, equivalent to a failing with convoyand arrival.—As where a fhip was infured at and from *Jamaica* to *Liverpool*, warranted to fail on or before the firft of *Auguft*, at a premium of 20 guineas *per cent.* to return 8*l.* *per cent.* if fhe failed with convoy. The fhip did not fail till *September*, and in an action for a return of premium, it was admitted that the infured was entitled to a return of 8*l.* *per cent.* for convoy (*a*).

Sect. IV.

Of the Deduction of one-half per Cent. upon a Return of Premium.

AS the infurer can never, by his own act, difcharge himfelf from the contract, it feems but reafonable that, where the infured thinks proper to put a ftop to the adventure, and prevent the rifk from ever commencing, he fhould make fome compenfation to the infurer for his trouble and difappointment; it is therefore the general cuftom in all the maritime countries of *Europe*, to allow him to retain one-half *per cent.* (*b*).—This the *French* denominate *droit de fignature*. *Pothier* (*c*) thinks it is given to compenfate the infurer for the lofs he fuftains by the non-

(*a*) *Meyer* v. *Gregfon*, fup. 658.——(*b*) *Molloy*, b. 2 c. 7, § 12.——(*c*) h. t. n. 181.

performance

performance of the contract on the part of the insured: *Emerigon* (*a*) says, it is for his trouble in signing the policy, and making the proper entry in his books; and this is the reason given in *Le Guidon* (*b*).

It is allowed to the insurer where the contract is void for some radical defect, provided this were unknown to him when he entered into the contract (*c*). But if he were informed of the fault, or must have known it, before he subscribed the policy; as if he were to insure a ship or goods, when he knew of their safe arrival, or seamen's wages, or contraband goods, knowing them to be such, he could have no claim to this allowance (*d*).

Pothier holds that if the contract become void, not by the act of the insured, but by some cause which he could not prevent or control, the insurer shall not be entitled to the half *per cent* (*e*).—*Emerigon*, on the contrary, maintains that in all cases where the policy becomes void, without any fraud on the part of the insurer, he shall have this allowance (*f*).

(*a*) Tom. 2, p. 168.——(*b*) Ch 2, art. 16.——(*c*) Ord. of *Antwerp*, art. 14, 2 *Mag.* 27.——(*d*) *Valin* on art. 10, 16, 17, h. t. *Pothier*, h. t. n. 183, *Emerig.* tom. 2, p. 169.——(*e*) *Pothier*, h. t. n. 181.——(*f*) *Emerig.* tom. 2, p. 169. Vid. *Le Guidon*, ch. 2, art. 16, ord. of *Amst.* art. 22. ord. of *Antwerp* art. 16. 2 *Mag.* 27, 28.

CHAP. XVI.

Of the Proceedings in Actions on Policies of Insurance.

IN treating of actions on policies of insurance we will inquire,

I. *In what courts they may be brought;*
II. *Of the declaration;*
III. *Of the plea, and bringing money into court;*
IV. *Of the consolidation rule;*
V. *Of the trial;*
VI. *Of the recovery back of losses, improperly demanded.*

Sect. I.

In what Courts Actions on Policies of Insurance may be brought.

The courts of common law have the sole jurisdiction in matters of insurance.

Insurance being a marine contract, the law which regulates it, is considered in most of the commercial states of *Europe*, as a branch of marine law, and therefore, where no commercial tribunal is established, questions arising upon this contract, generally belong to the jurisdiction of the courts of admiralty (*a*). In *Scotland* this is, in the first instance, a subject of admiralty jurisdiction. But I do not find that in *England* courts of admiralty have ever had jurisdictions in questions of insurance (*b*). In a former part of this work (*c*) I took occasion to observe, that although the modes of administering justice in our courts of common law, are so well suited to the investigation and decision of all commercial questions; yet, that it was not till towards the end of Queen *Elizabeth*'s reign, that ac-

(*a*) Vid. *Emerig.* t. 2, p. 319 ——(*b*) For this consult *Zouch* on the jurisdiction of the admiralty.——(*c*) Sup. 24.

tions

tions upon policies of insurance began to be brought in the courts of *Westminster*; and that the legislature, even then, conceiving that questions upon this contract ought not to be litigated in those courts, being governed by certain rules unknown to the common law, erected a court for the sole purpose of determining such causes; but that, though the powers of this court were greatly enlarged in a subsequent reign, yet it soon fell into disuse, and the determination of all questions arising out of this contract has long since exclusively belonged to the courts of common law.

Courts of equity have no jurisdiction in such cases.

Courts of equity have no more jurisdiction in cases of insurance than in those of the purest common law cognizance. They do, indeed, sometimes, in cases of insurance, as in all other cases, interpose their authority for the advancement of justice. They will compel a trustee to permit his name to be used by the *cestui que trust* in an action on a policy of insurance (*a*); they will issue commissions for the examination of witnesses residing abroad, or out of the jurisdiction of the court, and grant injunctions to stay the proceedings at law till the return of such commissions (*b*); they will compel a party charged with fraud to make a full discovery upon oath of all circumstances, within his knowledge, which may lead to a discovery of the real facts of the case; and deliver up, or permit an inspection of, all papers and documents which are material to the matters in dispute. But, except in such cases, it has been solemnly determined, that courts of equity have no jurisdiction in questions of insurance (*c*).

The parties cannot, by agreeing to submit their differences to arbitration, oust the supreme courts of the jurisdiction.

It may be proper, in this place, to mention, that the authority of the supreme courts of *Westminster* is so transcendant, that nothing but the express words of an act of parliament can take away or abridge their jurisdiction

(*a*) Per Lord *Hardwicke*, 1 *Atk.* 457.——(*b*) R. *Chitty* v. *Selwin*, 2 *Atk.* 359.——(*c*) R. upon demurrer in Chancery, and confirmed in the House of Lords upon appeal, *De Ghetoff* v. *Lond. Assur.* 3 *Bro.* Parl. Ca. 525; Per Lord *Hardwicke*, 1 *Atk.* 457.

in any case (*a*); and therefore a clause inserted in a policy, that, in case of any dispute between the parties, it shall be referred to arbitration, is merely nugatory; for, without it, the parties may, if they think proper, submit their differences to arbitration; and with it, neither can *compel* the other to do so; for the agreement of the parties cannot oust the supreme courts of their jurisdiction (*b*). If indeed, an award be actually made, it will be a bar to an action; or if the parties have submitted their differences to arbitration, and the reference be still depending, that, perhaps, may also be a bar (*c*).

Sect. II.

Of the Declaration.

Special *assumpsit* is the proper form of action against private underwriters.

THE common policy of insurance, subscribed by private underwriters, being only a written undertaking, not under seal, is but a simple contract, and therefore, assumpsit is the proper form of action to be brought upon it, against the underwriters. And as the action in such case is founded on a particular and express undertaking, made upon a consideration upon which the law would not, by necessary implication, raise the promise specified in the policy, the plaintiff must declare specially upon it.

Heads of the declaration.

In this, like every other case of special *assumpsit*, the contract must be set forth with precision; for any material variance or omission will be fatal (*d*).—The declaration must therefore recite the policy, which is alledged to have been made according to the custom of

(*a*) 2 *Hawk.* P. C. 286, 2 *Bur.* 1042.—— (*b*) R. *Kill* v. *Hollister*, 1 *Wilf.* 129. The same principle prevails in the *French* courts. There the judges will permit questions of *fact* or of *usage* to be referred to merchants; but they will never suffer any question of law to be submitted to the decision of such persons. *Pothier*, h. t. n. 201. —— (*c*) Per Cur. 1 *Wilf.* 129, sed Q.——(*d*) Vid. *Gilb.* law of evid. 193.

merchants,)

merchants), with ſuch warranties and ſtipulations as may have been introduced into it, with an averment that the defendant had notice of the policy.—It then alledges, that in conſideration that the plaintiff had paid his premium to the defendant, and had promiſed to perform all things on his part to be done, the defendant promiſed to become an inſurer for the ſum ſubſcribed by him, upon the terms mentioned in the policy, and that he would perform all things, on his part, as to that ſum; and alſo that he had ſubſcribed the policy as an inſurer for that ſum. That the inſured was, at the time of the inſurance, and at the time of the loſs, intereſted in the ſhip or goods inſured, to the amount of the value in the policy, if it be a valued one, or to the amount of the ſums ſubſcribed, if it be an open one. —It then ſtates that the ſhip, &c. on a certain day was in good ſafety at her port of departure; that ſhe ſailed on the voyage inſured within the time mentioned in the policy, if a time be limited for her ſailing; and with convoy, if there be a warranty for her ſo doing;—and it likewiſe avers an exact compliance with every other warranty expreſſed in the policy.—The loſs is then ſtated, which muſt appear to have been occaſioned by ſome of the perils inſured againſt; and this muſt be ſhewn with reaſonable certainty, that the inſurer may have notice of the caſe againſt which he is to prepare his defence.—Notice to the defendant of this loſs, and a demand of the ſum ſubſcribed by him are then averred: —And laſtly, the breach of the contract by the non-payment of the ſum ſubſcribed by the defendant.

This is the general outline of a declaration upon a common policy, ſubſcribed by individual underwriters in an ordinary caſe. When there are any particular circumſtances, it behoves the plaintiff to be careful to adapt his declaration to them.—It is uſual to add a count for money had and received by the defendant to the plaintiff's uſe, to enable the plaintiff to recover back his premium,* if, under all the circumſtances, he ſhould appear to be entitled only to that, or a part of it.

Count for money had and received.

It is not necessary to declare specially upon an adjustment. The insured may give it in evidence upon the usual declaration upon the policy.

When a loss has been adjusted, and the adjustment signed by the insurer in the usual manner, the insured, in order to recover this loss, is not obliged to declare specially upon the adjustment as upon a new contract; but may declare upon the policy in the usual manner, and give the adjustment in evidence, which, as we formerly observed (*a*), is equivalent to an admission, though not conclusive, of all the facts necessary to be proved, to entitle the insured to recover upon the policy (*b*).

The averment of interest may be either general or special.

The *averment of interest* in the insured may be either general or special. Under a general averment of interest the plaintiff may give in evidence any interest he may have in the thing insured. But if the interest be averred specially, it must be proved as stated. The general averment is, therefore, in most cases, to be preferred. Nor can I see any necessity for a special averment, unless the question of interest be the only matter in dispute between the parties, and the plaintiff mean to put this upon the record, in order to save the expence of a trial (*c*).

But the general averment is sufficient not only as to the *title*, but also as to the *quantum* of interest.

The general averment is sufficient, not only as to the *title* or *claim* of the insured, but also as to the *quantum of interest*. In assumpsit the plaintiff recovers damages according to the evidence, *pro tanto*; and, therefore, if he aver interest generally, in the entire thing insured, he shall recover for the loss in proportion to the *quantum* of interest he proves (*d*).

The declaration need not state the *species* of goods put on board the ship.

If in the policy the insurance be declared to be on a particular species of goods, it is sufficient in alledging the loading these goods on board, to state "that divers goods, wares, and merchandizes of such a value were

(*a*) Sup. ch. 14, § 3.—(*b*) Per Lord *Kenyon*, at N. P. *Rodgers* v. *Maylor*, sup. 634.—(*c*) See the case of *Crawford* v *Hunter*, sup. 85, where the interest was specially averred, probably to bring the question of interest, which, in that case, was a mere question of law, to an immediate decision upon demurrer.—(*d*) R. *Rising* v. *Burnett*, inf.

loaded

loaded on board," &c. without ſpecifying the particular goods (*a*).

If the inſurance be made in the name of an agent, the action may be brought either in his name or in the name of the principal; and in either caſe it muſt be averred that the policy was made in the name of the agent, as agent, for the uſe of the principal, who is averred to have been intereſted in the ſhip or goods inſured, to the amount of the ſum inſured, or the value in the policy.

If the inſurance be in the name of an agent, it muſt be averred for whoſe uſe.

In averring intereſt in the inſured, it is ſufficient to ſhew it to have been in thoſe who had the property *at the time of making the policy*.—Therefore, where it was averred in the declaration, that *P. Maingy* and *N. Maingy*, until, and *at the time of making the policy*, and alſo at the time of the loſs, were intereſted in the goods mentioned in the policy; and that the ſaid inſurance was made for the ſaid *P. M.*, and *N. M.*, and for their account.—In the courſe of the cauſe it appeared that a Mr. *Le Meſurier* had, ſince the policy was effected, become a partner with *P. M.* and *N. M.*, and had taken a ſhare of all the ſtock, *including the goods inſured.* Upon this it was urged on the part of the defendant, that the plaintiff ſhould be nonſuited; for as Mr. *Le M.* was intereſted in the goods inſured, the averment of intereſt in the declaration was diſproved.—But Mr. Juſtice *Buller*, who tried the cauſe, refuſed to nonſuit the plaintiff, being of opinion that as Mr. *Le M.* was not intereſted *at the time of making the policy*, to which the averment of intereſt related, the plaintiff had brought the action properly for thoſe only who were intereſted at that time (*b*).

Petchard v. *Whitmore*, at N. P. after Mich. 1786, 2 *Boſ.* & *Pul.* 155. n.

In averring the intereſt, it is ſufficient to ſhew it to have been in thoſe who had the property at the time of making the inſurance.

In this caſe it ſeems to have been taken for granted, that if Mr. *Le M* had been a part owner at the time the policy was effected, the plaintiff muſt have been nonſuited. Yet the following caſe ſhews that, even in

(*a*) R. on ſpecial demurrer; *De Symons* v. *Johnſton*, 2 New Rep. 77.——(*b*) And yet, the uſual form of the averment alleges that the inſured was intereſted not only at the time when the inſurance was effected, but alſo *at the time of the loſs*.

that

that cafe, the averment would be fufficiently fupported by the evidence.

Page v. *Fry*, 2 *Bof.* and *Pul.* 240.—3 *Efp.* Rep. 185.

A cargo is purchafed by *A.* who parts with a fhare in it to *B.*, and afterwards infures it on his own account; *A.* may aver intereft in himfelf alone. The fact of *B.*'s having been let into a fhare in the adventure, does not negative the averment, *A.* having ftill an intereft in the entirety of the cargo.

A policy was effected on a cargo of corn by the plaintiff, as agent to *Hyde* and *Hobbs*.—In the declaration on this policy, it was averred that *Hyde* and *Hobbs* were, 'at the time of loading the faid corn on 'board the faid fhip, and at the time of fubfcribing the 'policy, and alfo at the time of the lofs,' interefted in the faid corn, *to the amount of all the money infured thereon*, and that the faid policy fo made in the name of the plaintiff, was made for the ufe, rifk, benefit, and account of the faid *Hyde* and *Hobbs*.--Upon the trial before Lord *Eldon*, it appeared that after *Hyde* and *Hobbs* had purchafed the corn on their own account, they, thinking the engagement might be too large for them, offered another houfe a fhare in the corn, which was accepted; *Hyde* and *Hobbs* having informed the plaintiff of this, directed him to effect the infurance on the cargo. *Hyde* and *Hobbs* paid for the cargo, and invoices were made out to them.—It was objected, on the part of the defendant, that this evidence negatived the averment in the declaration, that the whole intereft was in *Hyde* and *Hobbs*.—Lord *Eldon*, however, directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonfuit.—Upon that motion, the court were clearly of opinion that *Hyde* and *Hobbs* had an intereft in the *entirety* of the cargo, fufficient to fupport the averment in the declaration, notwithftanding other perfons had a beneficial intereft in part.

Whether it be neceffary to aver intereft in a cafe not prohibited by the 19 *G.* 2. c. 37.

It has been holden (*a*) that before the ftat. 19 *G.* II. c. 37, infurances without intereft were not illegal; and that, before that act, it was unneceffary to aver intereft in the infured in any cafe whatever; and confequently that, fince that act, it is unneceffary to aver intereft in any cafe not prohibited by it.

Craufurd v. *Hunter*, 8 T. R. 13, fup. 109.

Commiffioners for the care of foreign fhips and

Therefore, where commiffioners, appointed under the ftat. 35 *G.* III. c. 8. § 21. were authorized to take into

(*a*) Vid. fup, 109.

their

their possession and care all *Dutch* ships and effects brought into or detained in the ports of *Great Britain*, and to dispose thereof according to such directions as they might receive from the privy council, it was determined that these commissioners might insure, in their own names, the ships and effects thus put under their care, while they were on their passage to this country; and that a count stating the nature of their trust, and averring an interest in them, as such commissioners, was good.—In the same case it was also determined, that a count averring that the ships insured did not, at the time when the insurance was effected, *belong to his Majesty or any of his Subjects*, was likewise good, without any averment of interest (*a*).

goods seized by the King, may insure in their own names, and declare on their own interest.

(*a*) The question in the above case of *Craufurd* v. *Hunter* was, in another action on the same policy, brought by writ of error into the *Exchequer Chamber*, where, after several arguments, the judgment of the *King's Bench* was affirmed, vid. *Lucena* v. *Craufurd*, 3 *Bos.* and *Pul.* 75, where the arguments of counsel, and of the judges are fully reported.—The cause was afterwards removed, by writ of error, to the *House of Lords*, where a number of questions were propounded to the judges, who, differing upon several of them, delivered their opinions *seriatim*. Lord *Eldon*, who dissented from the judgment of the *King's Bench* and *Exchequer Chamber*, took a most masterly and comprehensive view of the whole subject, and maintained his opinion by arguments which will, I am persuaded, have the effect of restoring the doctrine of insurable interest to its original and genuine principles, which, on some occasions, seem to have been lost sight of. The result was, that a *venire de novo* was awarded, the cause was again tried before Lord *Ellenborough*, when a verdict was found for the plaintiffs upon the second count of the declaration, which averred the interest to be in the King.—A bill of exceptions was tendered, which if persevered in will bring the case once more before the *Exchequer Chamber*.—See a very full report of the arguments in the House of Lords, 2 New Rep. 269. which, unfortunately, was not published till after the fourth chapter of this impression on *insurable interest* had been worked off.

This point has since, in the following case, been brought to a solemn decision.

Nantes v. *Thompson*, 2 *East* 385. sup 41.

A declaration on a policy on a *foreign ship* need not aver any interest in the insured, though the words "*interest or no interest*" be not in the policy.

An insurance was made, in the usual form, on the ship *Hoop*, valued at £1406, and goods on board, at and from *Elsineur* to *Ferrol*, *Cadiz*, and *Carthagena*, warranted to depart with convoy for the voyage. The declaration averred, that the plaintiff gave the order to the agent employed to effect the policy, 'that the said ship was not, at 'the time of effecting the policy, or at any other time, '*the property of his Majesty or any of his subjects.*' It then stated, that the ship, in the course of her voyage, arrived and anchored in *Plymouth Sound*, and was there arrested and detained by order of his Majesty, and afterwards condemned as lawful prize; whereby she became wholly lost to the plaintiff, and to every other person to whom the same did or might appertain. To this there was a demurrer, assigning for causes, that it was not alleged for whose use, or on whose account, the policy was made, nor to whom the ship belonged; *nor what person or persons were interested in the said insurance;* nor that the plaintiff, or any other person, *had any interest or property in the ship.*— In the argument it was contended, on the part of the defendant, that though it is competent to a foreigner, notwithstanding the stat. 19 *G.* II. c. 37, to lay a wager on the event of a ship's safe arrival, without any interest in the property; yet, that a policy, in the terms and principle of it, unless otherwise expressed, imported a contract of indemnity, and therefore necessarily supposed an interest in the party for whose benefit it was made. That if that were the understanding of the parties, such interest ought to be averred, otherwise it would be a deception upon the underwriter, who would, of course, demand a higher premium, because, upon a mere wager policy, every loss must be total; for in such case there could be no abandonment or benefit of salvage. And, moreover, that the insured in such case has no interest in the preservation of the ship, or her ability to perform the voyage, but is rather interested in insuring the most desperate risks; against which the underwriter ought to have due warning, by the usual words, "*interest or no interest:*"

interest."—But the court, on the authority of the above mentioned case of *Craufurd* v. *Hunter*, determined that, though these words were not in the policy, the declaration need not aver interest in the insured (*a*).

One of several insureds may alone sue, and aver a sole interest in himself.

If a policy be made in the names of two persons, one of them may bring an action on it alone, and aver the sole interest in himself; and proof of this will entitle him to recover (*b*).

The loss must be averred to have arisen from the true cause, and no other.

With respect to the *averment of the loss.*—As this fact is often the principal matter in dispute, it is necessary to state the true cause of it with reasonable certainty, that it may appear to have been a loss within the policy, and for which the defendant is liable; and also, that he may have notice of the case which he is called upon to answer.—Therefore, if a ship be destroyed by the worms which infest the rivers in hot climates, the insured cannot declare upon a loss by the perils of the sea (*c*). So, if a number of slaves perish for want of sufficient and proper food, occasioned by extraordinary delay in the voyage, arising from tempestuous weather; the insured cannot declare on this as a loss by the perils of the sea (*d*). So, if a ship be driven by stress of weather on an enemy's coast, and she be there captured, though not materially damaged; this must be averred as a loss by *capture*, and not by the *perils of the sea* (*e*).

So, if part of the ship's crew be taken away from their employment, at a critical moment, by an irresistable force, and in consequence the ship drive on shore, the injury, thus occasioned, is a loss *by the perils of the sea*, and must be so averred in the declaration (*f*).

If, in a declaration upon a policy without interest, the loss be averred to have been occasioned by *capture*,

(*a*) Vid. 4 *East* 400. *Kellner* v. *Le Mesurier*.—— (*b*) Per *Le Blanc* J. at N. P. *Marsh* v. *Robinson*, 4 *Esp.* Rep. 98.—— (*c*) R. *Rhol* v. *Parr*, 1 *Esp.* Rep. 444, sup. 492.—— (*d*) R. *Tatham* v. *Hodgson*, 6 T. R. 656, sup. 491.——(*e*) Per Lord *Kenyon* at N. P. *Green* v. *Elmslie*, *Peake* Rep. 212.——(*f*) R. *Hodgson* v. *Malcolm*, 2 New Rep. 336, sup. 490.

when, in fact, the ſhip was releaſed from the capture, and might have proceeded on her voyage; the inſured cannot recover; for the ſhip might have reached her deſtined port, which was the event inſured.—Had it been a policy *upon intereſt*, the inſured might have abandoned, and then the averment of a loſs by capture would have been good.

Kulen Kemp v. *Vigne*, 1 T. R. 304, ſup. 130.

A ſhip inſured, intereſt or no intereſt, is captured, but afterwards ſet at liberty in a condition to purſue the voyage inſured; but inſtead of that, ſails on a different voyage, and is loſt:—The inſured cannot recover as for a loſs *by capture*.

Therefore, where goods were inſured on board the ſhip *Emanuel*, at and from *Falmouth* to *Marſeilles*, *intereſt or no intereſt*, warranted a *Daniſh* ſhip.—In declaring on this policy it was averred, that 'Whilſt the ſhip was proceeding 'in her voyage from *Falmouth* to *Marſeilles*, and before ſhe 'could arrive at *Marſeilles*, ſhe was captured by the '*Spaniards*; and thereby the ſaid ſhip, and alſo the goods 'and merchandizes on board her, were totally loſt to the 'plaintiffs.'—Upon the trial it appeared, that the ſhip was taken by a *Spaniſh* privateer, and carried into *Ceuta*, where ſhe was condemned, but, upon appeal, was afterwards releaſed, and in a condition to purſue her voyage; but inſtead of proceeding to *Marſeilles*, which ſhe might have done, ſhe firſt ſailed to *Malaga* to refit, and from thence ſhe went on a voyage to *Bremen*, and in that voyage was loſt.—It was objected, on the part of the defendant, that the plaintiffs could not recover upon this form of declaring, for a loſs by *capture*; for though the veſſel was captured, yet having afterwards been reſtored, ſhe might have reached her deſtined port, in which caſe the underwriters would have been diſcharged by the terms of the memorandum; that if this had been a policy upon *intereſt*, the averment that the ſhip was loſt by capture would have been good; becauſe, in that caſe, the inſured might have *abandoned*: But this being a wager policy, and the event inſured againſt being the non-arrival of the ſhip at *Marſeilles*, the inſured could not abandon (*a*).—Mr. Juſtice *Buller*, who tried the cauſe, being of this opinion, nonſuited the plaintiffs.—Upon a motion to ſet aſide this

(*a*) Vid. *Fitzgerald* v. *Pole*, 5 *Bro.* Parl. Ca. 131. ſup. 584.

nonſuit,

nonsuit, it was contended, on the part of the plaintiffs, that the object of the voyage was defeated by the capture; that the moment the voyage was defeated, the insurers became liable, and after that, it was immaterial what course the ship took.—But the court adopted the same opinion upon which Mr. Justice *Buller* had nonsuited the plaintiffs, and held that this could not be averred to be a loss by *capture*; because, after the capture, the ship might still have proceeded to *Marseilles*, which was the event insured.

Nesbitt v. Lushington, 4 T. R. 783. sup. 147, 436.

If rioters board a ship and occasion a *stranding*, the loss cannot be recovered on a count for *detention of people*, or for a loss by *pirates*, but only upon a count for a loss by *stranding*.

So, if a mob of rioters board a ship, for the purpose of obliging the captain to sell a cargo of corn at an inferior price, and in consequence of this boarding, the ship be stranded, and a quantity of the corn lost; this is a loss by *stranding*, within the usual memorandum, and, in an action on a policy on the corn, it must be so laid in the declaration; nor could the insured recover in this case, upon a count for a loss by *detention of people*; because this mob did not constitute *a people* within the meaning of the policy: Neither could the insured recover for a loss by *pirates*; because, this being a policy on *corn*, the insurer was liable for no partial loss, unless it were a *general average*, or the ship were stranded; and this was not a general average, because the whole adventure was never in jeopardy; for the persons who took the corn intended no injury to the ship, or any part of the cargo but the corn.

Matthie and others v. *Potts*, 3 *Bos. & Pul.* 23.

British goods are seized in an attempt to run them into the *Spanish* main, as being contraband.—The insured cannot, in this case, declare as for a loss by capture *jure belli*.

So where goods were insured on board a *Spanish* ship, from *Nassau* to *Campeachy*.—The ship, having a licence from the *British* governor at *Nassau*, sailed for *Campeachy* in the *Spanish* main; and having arrived off that port, made signals for launches to come out, (as is usual in this contraband trade), into which the goods insured were put, for the purpose of being run on shore. In the attempt the goods were seized by two *Spanish* government brigs.—In an action on the policy, the declaration stated, 'That, before the goods were discharged or safely 'landed, they were, in a hostile and forcible manner, 'seized, captured, and carried away by persons, then be-'ing at war with our lord the king, to the plaintiffs un-'known.'

'known.'—It was objected at the trial that this averment was not supported by the evidence. But Lord *Alvanley*, who tried the cause, over-ruled the objection, and the plaintiffs had a verdict.—The court, however, upon motion, set the verdict aside. Mr. Justice *Chambre* said, he had no hesitation in saying, that, in his opinion, the plaintiffs ought to have been nonsuited, because the evidence produced did not support the averment of loss in the declaration.

If a loss happen in consequence of the captain's mistake, this cannot be declared upon, as for a loss by the perils of the sea.

The cause of the loss must be stated according to the truth of the case. The defendant has a right to insist upon this, in order that he may have an opportunity of demurring, or moving in arrest of judgment, if it be not sufficiently averred. If, therefore, a loss happen in consequence of the captain's mistaking his course; and, in the declaration, it be alleged that it arose from *the perils of the sea, contrary winds, and other misfortunes*, the plaintiff cannot recover.

Gregson v. *Gilbert*, B. R. 23 G. III. *Park* 62.

The captain of a slave ship mistakes his course, whereby a scarcity of water ensues, and a number of the slaves are thrown overboard to save the rest: It is not sufficient to state in the declaration that, *by contrary winds, currents*, &c., the ship was retarded, and the slaves perished for want of water.

Thus: In a declaration on a policy *on slaves* it was stated, —'That, by the *perils of the sea, contrary winds, currents,* '*and other misfortunes*, the voyage was so much retarded, 'that a sufficient quantity of water did not remain for the 'support of the slaves and other people on board, and that 'a certain number of the slaves *perished for want of water*.' —Upon the trial it appeared that the ship, being bound from *Guinea* to *Jamaica*, had missed the island, and that the crew were reduced to great distress for want of water; that the captain consulted with the crew, and it was unanimously agreed upon, that some of the slaves should be thrown overboard, in order to preserve the rest; and that, at the time this resolution was formed, there remained but one day's full allowance of water at two quarts *per* man (*a*). The jury, upon this evidence, found a verdict for

(*a*) It were impossible to pass over the mention of this transaction without some sentiment of reprobation. False reasoning has never been carried to the length of maintaining that human beings, however degraded their condition, could be justifiably cast into the sea, like so many bales of goods, to lighten a ship

for the plaintiff, with 30l. a-head for every ſlave thrown overboard.—The court, upon motion, granted a new trial, being of opinion, that the declaration did not ſtate the loſs according to the truth of the caſe.—Lord *Mansfield* ſaid,—"This is a very uncommon caſe, and deſerves further conſideration. There is great weight in the objection, that the loſs is ſtated in the declaration to have ariſen from the *perils of the ſea*, and that the currents, &c. had made the ſhip foul and leaky. Now, does it appear by the evidence that the ſhip was foul or leaky? On the contrary, the loſs happened by miſtaking *Jamaica* for another place."—Mr. Juſtice *Buller* ſaid,—"The declaration does not, in any part of it, ſtate the loſs which has been the occaſion of this demand; and it would be very miſchievous if we were to overturn this objection. Suppoſe, for a moment, that the underwriters, in ſome caſes, are liable for the *miſtake* of the captain; yet, if they are not liable in others, the nature of the loſs muſt be ſtated in the declaration, that the defendant may have an opportuniry of moving in arreſt of judgment, if it be not ſufficiently alleged. But it would be impoſſible for the defendant, in this caſe, to move in arreſt of judgment; for the facts of the caſe, as proved, are different from thoſe ſtated in the declaration. The point of law in arreſt of judgment cannot be argued from the facts ſtated on the record; and the declaration in this caſe ſtates the loſs to have happened by the perils of the ſea."

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a ſhip in a ſtorm. Every thing on board, however precious, ought to be thrown overboard ſooner than the meaneſt ſlave. Some have ſuppoſed that, in a caſe of extreme neceſſity, a part of the crew might be ſacrificed to ſave the reſt, and that the fate of the victim ſhould be determined by lot equally amongſt all. But others, upon juſter principles, maintain, that whoever, under pretence of ſaving the ſhip, ſhould throw any human creature into the ſea, whether by lot or otherwiſe, is guilty of homicide; for no man, in order to ſave his own life, has a right to take away the life of another, who makes no attack on him. Vid. *Puffend.* lib. 2. c. 6. § 3. ff. de reg. jur. 32. *Cic.* off l. 3, c. 23.

But the loss need not be stated in the very words of the policy.

In stating the cause of the loss, the best way is to alledge it, as nearly as may be, in the words of the policy: As if the loss be by *barratry*, it ought regularly to be stated to have been occasioned "*by the barratry of the master and* "*mariners.*" But it will be sufficient if it be stated in words which import the same thing.

Knight v. *Cambridge*, 2 Ld. *Ray*. 1349; 1 Str. 581. 8 *Mod.* 230, sup. 443.

If it be alleged that the loss happened by the *fraud and negligence* of the master; this is a sufficient allegation of *barratry*.

Thus, where it was alledged, that, *per fraudem et negligentiam magistri, navis prædicta depressa et submersa fuit, et totalitur perdita et amissa fuit, et nullius valoris devenit:*—It was objected that this was not within the meaning of the word *barratry*, and that the allegation should have been express, that the ship was lost by the barratry of the master; and that, though barratry may import *fraud*, yet it does not import *neglect*.—But the court were unanimously of opinion that there was no occasion to aver the fact *in the very words of the policy*; but if the fact alledged came within the *meaning of the words*, it was sufficient (*a*).

Where salvage is to be recovered, it is sufficient to state the injury which occasioned it.

Where salvage is to be recovered it is not necessary to declare for salvage, *eo nomine*. It is sufficient to state the accident or injury which occasioned that charge, without stating specially the particular circumstances which led to it.

Carey v. *King*, Ca. Temp. *Hard*. 304.

Thus:—The plaintiff declared, 'that the ship '*sprung a leak and sunk* in the river, whereby the goods 'insured were spoiled:'—The evidence was, that some of the goods were spoiled, and some saved; and the question was, whether the plaintiff might give in evidence

(*a*) The particular manner in which the loss in that case was occasioned does not appear in any of the printed reports of it. But in a MS. note of the arguments of *Stamma* v. *Brown*, taken by Mr. *Ford*, (cited by Lord *Ellenborough* in *Earle* v. *Rowcroft*, 8 *East* 135.) the case of *Knight* v. *Cambridge* is cited to shew that "*if the master sail out of the port without paying the port duties, whereby the goods are forfeited, lost, or spoiled,*" *that is barratry*; and Lord C J. *Lee*, in the same case of *Stamma* v. *Brown*, 2 *Str.* 1174, compared it to the case of a *sailing out of port, without paying the duties, whereby the ship was subjected to forfeiture*, which, he said, had been holden to be barratry; probably alluding to *Knight* v. *Cambridge*.

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the expence of *salvage*, that not being particularly laid in the declaration as a breach of the policy.—Lord *Hardwicke*, C. J. said;—" I think it may be given in evidence; for the insurance is against all accidents. The accident laid in the declaration is, that the ship sunk in the river; it goes on and says, that, by reason thereof, the goods were spoiled, which is the only special damage laid: Yet it is but the common case of a declaration that lays special damage, when the plaintiff may give evidence of any damage that is within the cause of action as laid; and though it was objected that such a breach of the policy should be laid, as that the insurer may have notice to defend it; it is so in this case, for they have laid the accident, which is sufficient."

Only debt or covenant will lie on the policies of the two insurance companies.

The two insurance companies being corporations can do no act but by deed under their common seals. Their policies of insurance, therefore, being under seal, no action of *assumpsit* will lie upon them, but only debt or covenant.

The 6 *G.I.* c. 18. prescribes a form of declaring in debt.

By the stat. 6 *G.* I. *c.* 18. § 4., each of these companies is directed to provide such a stock of ready money as shall be sufficient to answer all just demands upon their policies for any losses that may happen, and to pay the same from time to time, according to the tenor of their policies: ' And in case of refusal, the insured may ' bring his action of *debt*, or *on the case* (*a*), bill, suit, or ' information of the money demanded, against the cor- ' poration refusing to pay as aforesaid, in any of His Ma- ' jesty's courts of record at *Westminster*.—And in such ' action the plaintiff may declare, " *That the same cor-* " *poration is indebted to him in the money so demanded, and* " *have not paid the same according to this act*;" and ' thereupon the plaintiff or plaintiffs shall recover against ' the same corporation double damages besides full costs ' of suit.'

(*a*) This act must have been drawn by some person very little skilled in legal forms. An action *on the case* is here given on their policies *under seal*; and this is followed by a form of declaring in *debt*.

This last clause absurdly subjected these companies to double damages, besides costs, in actions which they could not prevent or avoid, for want of a provision in the act to oblige the insured to make discovery of his loss before action brought. This being found to encourage suits for the sake of double damages was soon repealed by a clause in a subsequent statute. These corporations are now, therefore, only liable to pay their losses in the same manner as private underwriters (*a*).

The venue may be changed if wrong laid, unless it be by deed.

If the venue in the declaration be laid in a wrong county, the court, upon motion, will change it to the county where the policy was made (*b*), unless it be by *deed*; in which case the court will not change the venue, without some special ground being laid to induce them to depart from the general rule (*c*).

The premium may be recovered back in an action for money had and received.

If the insured seek only to recover back his premium; the proper form of action is *indebitatus assumpsit*, for money had and received by the defendant to the use of the plaintiff.

Sect. III.

Of the Plea, and bringing Money into Court.

In what cases the general issue is the proper plea.

THE most usual plea to an action on a policy of insurance is the general issue, *non assumpsit*; which not only puts in issue every fact alledged in the declaration, but also enables the defendant to give in evidence any matter that goes to disaffirm the contract, or to discharge the plaintiff's demand under it (*d*).—If, therefore, the defendant would dispute the legality or the validity of the policy; if he would deny the interest of the insured, and shew the policy to have been a wagering one; if he would prove that the insured has been

(*a*) Vid. stat. 8 *G.* I., ch. 30, § 25.—— (*b*) And. 66, 2 Str. 1180, Say. Rep. 7, 2 T. R. 275.—— (*c*) 1 T. R. 781.—— (*d*) *Doug.* 106, 7. Vid. *Bul.* N. P. 152. *Penson* v. *Lee*, 2 *Bos.* & *Pul.* 330, sup. 655.

guilty

guilty of misrepresentation, concealment, or any other fraud; that the ship was not sea-worthy; that the voyage insured was not the voyage intended; that the ship sailed on a different voyage from that described in the policy; that there had been a deviation; that no loss, or at least not to the amount claimed by the plaintiff, had happened,—the general issue is the proper plea (*a*).

Under the general issue, the defendant may shew non-performance of a warranty

Though the compliance with every warranty expressed in the policy, or implied in the contract, is an affirmative which it is incumbent on the plaintiff to prove; yet, in answer to the general evidence from which such compliance is usually presumed, the defendant may, under the general issue, give express evidence of a non compliance: As, that the ship did not sail with convoy; that she never obtained sailing instructions, or had unnecessarily quitted the convoy; that she was enemy's property, though warranted neutral; that she had forfeited her neutrality, &c.

(*a*) In the case of *Goram* v. *Sweeting* (2 *Saund* 205), the defendant, to a declaration for a total loss by the perils of the sea, pleaded that the ship arrived safe; "*absque hoc*, that "the ship, her tackle, apparel, and furniture, were sunk in the "sea *and* lost."—Upon demurrer to this plea, it was objected that the traverse being in the conjunctive, if issue had been taken on it, and so much as an anchor or cable had been saved, the defendant would have been entitled to a verdict, though every thing else had been lost.—The court gave judgment for the plaintiff.—*Saunders*, who was counsel for the defendant, and probably drew the plea, concludes his report in much displeasure at the judgment of the court, who, he says, *decided without much consideration, or well understanding the case*. The plea was one of those artful expedients to gain an unfair advantage, in which the bar, in *Saunders*'s time, and, indeed, *Saunders* himself, were but too fertile. Special pleas, *in assumpsit*, to avoid or disaffirm the contract, or discharge the plaintiff's demand under it, are now quite exploded. The plea of *non assumpsit* which puts in issue every material allegation in the declaration, and under which the defendant may prove whatever shews that, *ex equo et bono*, the plaintiff has no right to recover, is now the only plea ever pleaded in actions on policies of insurance, which are meant to be tried upon the merits only.

Or that the insurance was double.

So the defendant may ſhew that it was a double insurance, and that the plaintiff had already recovered to the amount of his intereſt againſt the underwriters in another policy, to whom the defendant has made contribution (*a*).

By ſtat. 19 G.II. c 37. the inſured muſt diſcloſe how much he has inſured in the whole.

To enable the defendant to diſcover whether there be a double inſurance in any caſe, he may, under the ſtat. 19 G. II., c. 37. § 6, call upon the plaintiff to declare in writing, within 15 days, what ſum he has inſured in the whole, and how much he has borrowed on bottomry or reſpondentia, for the voyage in queſtion or any part of it (*b*).—It is a little ſingular, however, that this act provides no means of compelling the plaintiff to deliver this declaration, nor any puniſhment for delivering a falſe one. The court would, probably, after the expiration of the 15 days, ſtay the proceedings till a ſatisfactory declaration were delivered. An action would, perhaps, lie at the ſuit of the inſurer againſt the inſured, either for refuſing to make ſuch declaration, or for delivering a falſe one (*c*).

When the defendant may plead a tender.

Where the queſtion between the parties is, not whether the underwriters be liable to pay any thing to the inſured, but only *how much* they ſhall pay, it will be adviſable for them to *tender*, before any action brought, the ſum which, under all the circumſtances, they conceive to be fully ſufficient to ſatisfy every fair claim of the inſured. When ſuch tender has been made and rejected, it may be pleaded, with non-aſſumpſit as to the reſidue of the plaintiff's demand.—The plaintiff, by his replication, may either deny the tender; or confeſs it, and join iſſue on the plea of *non aſſumpſit* as to the reſidue, and upon that iſſue proceed to trial for further damages.

When he ſhall bring money into court.

When the underwriter in ſuch caſe, has omitted to make a tender before proceſs has been ſued out againſt him, he ſhould *bring the money into court* (*d*).—Before the ſtat. 19 G.II.

(*a*) Vid. ſup. ch. 4. § 4.——(*b*) Vid. ſup. 129.——(*c*) Vid. 2 Inſt. 74, 104. F. N. B. 161.——(*d*) Vid. ſup. ch. 15, § 1.

c. 37,

c. 37, it would ſeem that this was not permitted in actions on policies of inſurance: and yet, in *aſſumpſit*, and covenant for the payment of money, and in debt alſo, even where the plaintiff might have recovered leſs than the ſum demanded, this practice had been allowed long before (*a*). But by this act (§ 7.) it is provided, 'That in debt, 'covenant, or any other action on any policy of inſu- 'rance, the defendant may bring into court any ſum or 'ſums of money; and if the plaintiff ſhall refuſe to ac- 'cept the ſame, with coſts to be taxed, in full diſcharge 'of ſuch action; and ſhall afterwards proceed to trial, 'and the jury ſhall not aſſeſs damages exceeding the mo- 'ney brought into court; the plaintiff ſhall pay the de- 'fendant in ſuch action, the coſts to be taxed.'

It has been already ſhewn that an inſurance on the property of an *alien enemy* is void; and that no action can be maintained on any ſuch inſurance, either at his own ſuit, or on his behalf (*b*). If, therefore, an action on a policy be meant to be defended on that ground, it may be ſpecially pleaded in bar, being matter of law, which does not go to the gift of the action, but only to the *diſcharge* of it (*c*).

Whether *alien enemy* ought to be pleaded, or given in evidence under the general iſſue.

As to the two inſurance companies, though the clauſe of the ſtat. 6 *G*. I. c. 13. § 4. which gave double damages againſt them, was repealed by the ſtat. 8 *G*. I. c. 30. § 25.; yet the form of the policy remained, and it was ſtill neceſſary to ſue them either in debt or covenant; from whence this inconvenience aroſe, that theſe companies, when ſued, were obliged to plead ſpecially (*d*); becauſe the general iſſue, *non eſt factum*, only puts

The two inſurance companies may, to *debt*, plead *nil debet*, and to covenant, *non infregit conventionem*; and the jury may give the whole, or ſuch part of the ſum inſured as the plaintiff is entitled to recover.

(*a*) 5 Mod. 212. 1 *Vent*. 356. 2 *Salk*. 596, 7. 1 Lord *Ray*. 255.—— (*b*) Vid. ſup. ch. 2. § 1——(*c*) In the caſe of *Brandon* v. *Neſbitt*, 6 T. R. 23, ſup. 38, it was pleaded; but in *Briſtow* v. *Towers*, 6 T. R. 35, ſup. 39, the defendant pleaded the general iſſue, and the fact was found by the ſpecial verdict. ——(*d*) If the form of declaring mentioned in the ſtat. 6 *G* I. c. 18. § 4. (which does not mention or even refer to the policy) had been adopted in actions againſt theſe companies, the inconveniencies

puts in iſſue the exiſtence of the inſtrument upon which the plaintiff declares (*a*). The conſequence muſt have been, that the parties were often entangled in the intricacies of pleading; and even when an iſſue was at length joined, it frequently happened that the whole merits could not come in queſtion, and the jury were obliged to find a verdict for the whole ſum inſured, though in juſtice only a ſmall part of it was due. This drove the defendants to ſeek relief in courts of equity, when the matter in queſtion might as well have been determined at once by the jury, in like manner as in the caſe of private inſurers (*b*).—To remedy this inconvenience, the ſtat. 11 *G.* I. ch. 30. § 43. provides,—' That in all actions of debt ' againſt either of the ſaid corporations, upon any poli- ' cies of inſurance under their common ſeal, it ſhall be ' lawful for them to plead generally *that they owed nothing* ' to the plaintiff in ſuch action; and in actions of co- ' venant upon ſuch policies to plead generally, *that they* ' *have not broke the covenants* in ſuch policy contained, or ' any of them. And if iſſue be joined thereupon, it ſhall ' be lawful for the jury, if they ſee cauſe, to find a ' verdict for the plaintiff, and to give ſuch part only of ' the ſum demanded, if in debt, or ſo much damages, ' if in covenant, as it ſhall appear to them, upon the ' evidence, ſuch plaintiff ought in juſtice to have,'

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conveniences here enumerated might have been avoided; becauſe, to ſuch a declaration the defendant might have pleaded *nil debet*, and upon that plea the parties might have gone to trial upon the merits, whatever thoſe merits might have been, in like manner as upon the general iſſue in an action of *aſſumpſit* upon a common policy. But, unfortunately, plaintiffs were not *compelled* by the ſtatute to adopt the form of declaration therein given; and they, or at leaſt their attornies, were too much intereſted to purſue a different courſe.

(*a*) 5 Co. 119.——(*b*) Vid. recital to the ſtat. 11 *G.* I. c. 30. § 43.

Sect. IV.

Of the Consolidation Rule.

WE have already seen that the underwriters on common policies only bind themselves *severally*, that is, each for the amount of his own subscription, and not jointly; because it would be impossible to find any number of underwriters who would be willing to bind themselves for each other, as they must do if the contract were *joint*; and, indeed, since the establishent of the insurance companies, such a policy would be void by the stat. 6 G. I. c. 18. (*a*). Hence the insured, even if he were so disposed, cannot bring a joint action against all the underwriters on a common policy, but must seek his remedy by a separate action against each. This, though it necessarily results from the form of the contract, was a subject of complaint so long ago as the time of Queen *Elizabeth* (*b*); and it cannot be denied that it enabled the insured, if his demand were disputed or delayed, to proceed to trial in all the actions, however small his demand might be against each underwriter, and thus subject each to the entire costs of an action. They therefore often found it to be the wiser policy, rather to submit to an unjust demand, than subject themselves to such heavy charges. Sometimes, indeed, they sought relief in courts of equity, which granted injunctions to stay the proceedings in all the actions but one, the defendants in the rest undertaking to pay, according to their subscriptions, if the plaintiff should recover in that one.

The necessity of consolidating actions on policies of insurance.

This was formerly done by courts of equity.

This being found to be very inconvenient, and little less expensive than the oppressive proceeding against which the underwriters sought relief, an attempt was at length made by

First attempt to do this in a court of law.

(*a*) Sup. 46.——(*b*) Vid. the preamble to stat. 43 *Eliz.* c. 12, sup. 25.

by Mr. Serjeant *Eyres*, in the year 1731, in a case where 28 actions had been brought on a policy, to stay the proceedings in all but one, the defendants in the rest entering into a rule of court that those causes should abide the event of that one. But the plaintiff refusing to give up his advantage, and consent to such a rule, the court declared they could do nothing in it (*a*).—It has been said (*b*) that "Mr. Justice *Denison* intimated, that if the plaintiff persisted, against his own interest, in his right to try all the causes, the court had the power of granting imparlances in all but one, till there should be an opportunity of trying that one action; that Lord *Mansfield* then stated the great advantage resulting to each party by consenting to the application which was made; and added, that if the plaintiff consented to such a rule, the defendant should undertake not to file any bill in equity for delay, or to bring any writ of error, and should produce all books and papers that were material to the point in issue; and that this rule was afterwards consented to by the plaintiff."—It is not precisely stated when, or upon what occasion, this passed. From the manner in which it is introduced, it would seem as if it had passed in the above case of —— v. *Glover* But neither Mr. Justice *Denison* or Lord *Mansfield* was a judge till many years after that case. It is extremely probable that after Lord *Mansfield* came to preside in the court of King's Bench, he and Mr. Justice *Denison* did, upon some occasion, express sentiments similar to those ascribed to them; because it is well known that Lord *Mansfield*, soon after his coming into that court first established the consolidation rule, and settled the practice upon it in its present form. It is singular, however, that Sir *James Burrow*, who has reported the decisions of the court of King's Bench for many years after Lord *Mansfield* came to preside there, has published no report of the case in which so important an alteration of the practice first took place.

(*a*) Vid. ——— v. *Glover*, Hil. 5 *G*. II. 2 *Barnardist*. 103. —(*b*) *Park* introd. p. 50.

Be this as it may, it is now the constant practice, where a number of actions are brought upon the same policy, to consolidate them by a rule of court, or by a judge's order, which restrains the plaintiff from proceeding to trial in more than one, and binds the defendants in all the others to abide the event of that one. But this is done upon condition that the defendant shall not file any bill in equity, or bring any writ of error, for delay. The nature of the rule, and the terms on which it is usually made.

But besides these, the court, upon a proper ground being made by the plaintiff, will impose any other terms upon the defendants, which, under all the circumstances, appear reasonable: As, that they shall produce, at the trial, all books, papers, &c. in their custody, material to the point in issue; that the defendant in the action to be tried shall admit his subscription to the policy, the interest of the insured, the loss, or any other fact, upon which the question intended to be tried does not turn, or which is not meant to be seriously disputed. But the court will not impose any terms on the defendant out of the ordinary course, without his consent, which, however, a defendant, who only means to litigate fairly and honorably, will never refuse, when it is only to save the trouble and expence of proving facts which are not disputed. On the other hand, the court, in consideration of these unusual concessions, will impose any reasonable counter-terms on the plaintiff, which the defendant may have to propose. Mutual admissions.

It is no part of the consolidation rule that the plaintiff shall be at liberty to try the other causes if he please. Such a liberty would defeat the end proposed by the consolidation rule; and, therefore, if the plaintiff will not consent to the rule without this term, the court will grant imparlances in all the causes but one, till he consent (*a*). It is never made a part of the rule that the plaintiff may try the other causes if he please.

Thus has a practice, which was often attended with ruinous consequences to the one party or the other, at length, by the wisdom of the judges, been converted into an effectual means of obtaining substantial justice for Benefit resulting from this rule.

(*a*) Per Cur. *Brown* v. *Newnham*, E. 25 G. III. B. R. MS.

both

both, at a moderate expence, in cases where the obstinacy or dishonesty of plaintiffs might, before this regulation took place, have rendered that almost impossible.—On the one hand, the court may stay the plaintiff's proceedings for any length of time, if, through perverseness, or the cunning of interested or illiberal advisers, he refuse his consent to consolidate the actions upon proper terms: If, on the other, the defendants will not accede to such terms, the court, to punish them, may permit all the actions to proceed.

All the defendants are bound by the verdict in the cause tried.

But though, by the rule, the defendants undertake to be bound by a verdict in the action which is to be tried, yet this must be understood to mean such a verdict as ought to stand, as a final determination of the cause. It is certainly very beneficial to the parties that there should be but one trial for all the underwriters on the policy; but then that trial should be a satisfactory one (*a*). And therefore, if the plaintiff obtain a verdict, but the defendant apply for and obtain a new trial, the other defendants shall not be obliged to pay their money till the ultimate decision of the cause in favour of the plaintiff (*b*). And in cases of insurance, therefore, the courts should, in general, be less strict, and sometimes grant new trials upon less decisive grounds than in other cases. Sometimes, indeed, the insured, where he is not aware of the nature of the defence that is meant to be set up by the underwriters, or where there is a very doubtful or difficult question to be tried, will not agree to consolidate; but will proceed to trial in one cause at a time, reserving to himself the power of bringing his case again and again under discussion, so long as he has any hope of success.

If an attorney sue out a writ of error, though for manifest error, this will be a breach of the rule.

By the terms of the consolidation rule, the defendants are bound *generally* not to bring *any writ of error*; the meaning of which is, that, after a fair trial, and substantial justice has been done, no writ of error shall be brought, though manifest error appear on the face of the record. For even then, the writ of error being against the justice

(*a*) Per Lord *Mansfield*, 1 *Bl.* 464.—(*b*) R. *Hodgson* v. *Richardson*, 3 *Bur.* 1477.

of the cafe, the court will hold the party ftrictly to the terms of the rule by-which the plaintiff has been prevented from proceeding in the ordinary courfe of law. If, therefore, under fuch circumftances, the defendant's attorney bring a writ of error, the court will grant an attachment againft him for his contempt in fuch a breach of the rule (*a*).

Sect. V.

Of the Trial.

Proof of the plaintiff's cafe.

IF the parties proceed to trial upon the general iffue, which moft frequently happens, the plaintiff, as has been already obferved, muft, as in all other cafes, begin by proving every material allegation contained in his declaration.—If any of the facts of the cafe, on either fide, have been agreed to be admitted, thefe admiffions are reduced into writing and figned by the attornies on both fides, and being read, they fupply the place of actual proof.

The neceffity of mutual admiffions.

In every litigation upon commercial fubjects, and particularly in matters of infurance, it is highly proper, nay in fome cafes abfolutely neceffary, that the parties fhould mutually admit every fact that is not meant to be ferioufly difputed, in order that the cafe may be put upon its true merits with as little expence, vexation, or delay as poffible. Commercial liberality and profeffional honour both equally require that this fpecies of candour fhould be carried as far as the fair and juft pretenfions of the parties will admit. Nothing can more conduce to the ends of juftice, nothing can more exalt our national character, or promote the true interefts of commerce, than fuch mutual conceffions.

The rules of evidence are, in general, the fame in trials upon policies of infurance as in other cafes. There

(*a*) R. *Camden* v. *Edie*, 1 *H. Bl.* 21.

are only three cases to be found in our books upon points of evidence which may be thought peculiar to insurance. The first is a very short note, in which it is said to have been determined, that in an action on a policy of insurance, any who have insured upon the same ship cannot be witnesses.—Mr. Justice *Buller*, from whose book the above note is cited, in delivering his judgment in the following case of *Bent* v. *Baker*, says, that he took great pains, but without success, to get the real statement of that case, thinking that it might have been determined on its own particular circumstances. "However," says he, "in consequence of that determination, judges at *nisi prius* have frequently rejected underwriters as witnesses. Nor is it extraordinary that, at *nisi prius*, they should have been guided by the only case upon the subject, without much examination into the grounds of it."

Ridout v. *Johnson*, E. 11 *An.* *Bul.* N P. 283.

In general, an underwriter cannot be a witness in an action on a policy.

Bent v. *Baker*, 3 T R. 27.

But if the broker who effects a policy, subscribe it himself, after the other underwriters have subscribed it;—he may be a witness for the other underwriters, if they release him from all contribution for costs, though an action be depending against him, and he has joined in a bill in equity against the insured, for a discovery.

In the second case, which was solemnly determined upon great consideration, one *Bowden*, the broker who had effected the policy, was produced as a witness on behalf of the defendant. It appeared that *Bowden* had subscribed the same policy immediately after the other underwriters; that an action was then depending against him for the same loss; and that he and the other underwriters had filed a bill in equity against the insured for a discovery, in order to avoid the policy.—It was objected on the part of the plaintiffs, that he was not a competent witness for the defendant. Upon this the defendant produced a release to *Bowden* of all demands for any contribution of costs both in law and equity, and the costs of the suit in equity were tendered to the plaintiffs, with an undertaking to dismiss their bill, which the plaintiffs refused.—The witness was rejected by Lord *Loughborough*; and the question of his competency coming before the court of King's Bench upon a bill of exceptions, it was there determined, that, under the circumstances, he was a competent witness for the defendant, and that his testimony ought to have been received.—Lord *Kenyon* founded his opinion on the ground that the witness was not interested.—Mr. Justice *Ashurst* thought that, as he had acted as broker, he could not afterwards, by subscribing the policy, or by any

any other act of his own, deprive either party of his testimony.—Mr. Justice *Buller* was of opinion, that if the witness was competent to answer *any* question, he ought not to have been rejected *generally*; and that, on the principle of necessity alone, he ought to have been received; as he might be the only person who, from the nature of the thing, could speak to a representation, for instance, made by himself to the underwriters.

This case affords a sufficient proof, that brokers and others, who act as agents, either for the insured or the insurers, ought never to be underwriters (*a*).

De Symonds v. De La Cour, 2 New Rep. 374.

In an action on a policy on goods, the captain, who is a part owner of the ship, is a competent witness to prove that the port of destination in the policy was the true destination of the ship; but not to prove that a deviation was justified by necessity.

The last of these cases was a policy on goods from *London* to *Emden*; and it appeared that the ship, meeting with difficulties in her voyage, put into the *Texel*, where she was seized by the *Dutch*.—The defence set up was, that the goods were originally destined for the *Texel*, and not for *Emden*.—To prove that *Emden* was the real destination of the ship, and that she sailed for that place by the direction of the owners of the goods, the plaintiffs called the captain, who was a part owner of the ship.—It was objected, that he was not a competent witness. But Sir *James Mansfield*, Chief Justice, who tried the cause, overruled the objection, and the plaintiffs had a verdict.—In support of an application to the court to set this verdict aside, it was contended, that, as the ship had deviated from the voyage insured, the plaintiffs were bound to shew that she was driven into the *Texel* by necessity; but that, if she deviated without necessity, the owners of the ship were answerable to the owners of the goods, and consequently, the captain, being a part owner, had a direct interest.—But the court held, that he was a competent witness to prove that, by the direction of the owners of the goods, the ship originally sailed on the voyage insured, though not to prove that the deviation was justified by necessity.—Mr. Justice *Rooke* said, that the ground upon which he concurred in this decision was, that as the captain acted as the agent of the owners of the goods, and with their knowledge, they could have no action

(*a*) Vid. sup. 301.

against him, as had been alleged on the part of the defendant.

The evidence generally adduced on the part of the plaintiff is reducible to the following heads:

1. *Proof of the contract;*
2. ——— *payment of the premium;*
3. ——— *the interest of the insured;*
4. ——— *compliance with warranties;*
5. ——— *the loss.*

1. *Proof of the Contract.*

The policy being proved, is conclusive evidence of the contract; and no parol evidence can be received to vary the terms of it.

The first step on the part of the plaintiff is to prove the contract, which is done by producing the policy and proving the defendant's subscription to it. This, if there be no variance, is conclusive evidence of the contract stated in the declaration; and the general rule is, that no evidence can be received of any parol stipulation or agreement to alter, control, or qualify it (*a*).

Kaines v. *Knightly*, *Skin.* 454.

A parole agreement that the risk should begin at a place different from that inserted in the policy, cannot be received in evidence.

As, where an insurance was made "from *Archangel* to "*Legborn*;" and upon a trial at bar, the defendant endeavoured to set up a parol agreement, made before the subscription, that the adventure should only begin from the *Downs*:—It was objected, that unless such agreement be put in writing, it shall be taken that the policy speaks the minds of the parties; and to suffer policies to be defeated by agreements not in writing, would be to lessen their credit, and render them of no value.—Lord C. J. *Pemberton* said, that policies were sacred things; and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange, payable at such a day, shall be allowed to say that it was agreed to be upon a condition, &c.

(*a*) Yet see the case of *Bates* v. *Grabham*, *Salk*, 444. sup. 344. and the other authorities cited in ch. 8. § 4.

when

when the bill may have been negociated: For though neither of them is a ſpecialty, yet they are of great credit, and much for the ſupport, convenience, and advantage of trade.—The jury, however, found contrary to the direction of the court. But this verdict was ſet aſide; and upon another trial at bar, the next term, there was a verdict for the plaintiff, according to the direction of the court.

Witneſſes may prove an *uſage* as explanatory of a clauſe in the policy: but their *opinions* are not admiſſible.

Witneſſes may be examined, however, to prove an *uſage*, as explanatory of a clauſe in a policy; but their *opinion* of its meaning is not admiſſible evidence (*a*). Queſtions of conſtruction are queſtions of law, which the judges only are competent to determine; and the opinion of no other perſon, whatever may be his ability or experience, can ever be looked upon as of authority in our courts, or received in evidence before a jury.

How far the *uſage of trade* ought to be regarded.

With reſpect to *uſage*, it is a ſort of natural law, formed out of our habits, our intereſts, and the univerſal conſent of mankind. In all maritime affairs, it is regarded as the ſureſt interpreter of the law. There the maxim, *Optima eſt legum interpres conſuetudo*, particularly applies. In queſtions of inſurance, eſtabliſhed uſages muſt in all caſes be adhered to; and in doubtful caſes, they are the ſafeſt guide we can follow. If the uſage of trade in any inſtance be not ſufficiently known or rightly underſtood, it is adviſable to conſult the moſt experienced merchants. Still, however, the force of uſage is not to deſtroy the law. Uſage is to be conſulted only where the law is doubtful. Where the law is clear, it muſt prevail. The law is permanent; but uſages ſometimes change, and often diſappear with the circumſtances which gave them birth.

How procuration ſhall be proved.

Policies are often ſubſcribed by an agent in the name of the underwriter, and in ſtrictneſs, the procuration or authority of the agent, thus to ſubſcribe for his principal, ought to be proved. Few defendants, however, would

(*a*) Per Lord *Mansfield*, in *Lyons* v. *Bridge*, *Doug.* 512. Vid. alſo Lord *Mansfield*'s judgment in *Carter* v. *Boehm*, ſup. 479.

ever think of availing themſelves of the want of ſuch proof in an action which ought never to be tried but upon ſome point fairly diſputable. An inſtance, however, occurs where the attempt was made.

Neale v. *Erving*, 1 *Eſp.* Rep. 61.

In an action on a policy, the broker was called to prove the ſubſcription. He ſaid that the defendant's name had been ſubſcribed by one *Hutchins*; he did not know by what authority, but that *Hutchins* was in the conſtant habit of ſubſcribing policies in the defendant's name, and had done ſeveral for him and for others to his knowledge.---It was objected that *Hutchins* might have done this by a power of attorney, which might have been limited, or for a particular purpoſe; and therefore ſhould have been ſhewn, that it might appear that *Hutchins* was properly authoriſed.---But Lord *Kenyon* over-ruled the objection, being of opinion that the acts of *Hutchins* held him out to the world as properly authoriſed; and his having ſubſcribed ſeveral policies in the defendant's name, was ſufficient evidence of that authority to charge the defendant: That if *Hutchins* was only a particular agent for the defendant, it lay on him to ſhew it, not the plaintiff.

2. *Proof of Payment of the Premium.*

Proof of the policy is proof of the payment of the premium.

Every policy contains a clauſe by which the underwriters confeſs the receipt of the premium, after the rate of ſo much *per cent.*; and the policy being proved, is therefore evidence of its having been paid.

Policies are, in general, effected by the intervention of brokers, between whom and the underwriters open accounts are uſually kept, in which the brokers make themſelves debtors for all premiums, and take credit for all loſſes which they are authoriſed to receive from the underwriters; and theſe accounts are ſettled and adjuſted at ſtated periods. In general, therefore, the underwriter looks to the broker only for his premium. It often, indeed, happens that the underwriter knows not who the inſured is; and as he gives the inſured a receipt for the premium upon the face of the policy, it muſt be ſuppoſed

 that,

that, having thus difcharged him, if the premium be left unpaid, he gives credit only to the broker, and from him only can he recover it (*a*).

3. *Proof of the Intereft of the Infured.*

The next thing to be proved is the *intereft* of the infured (*b*). This may be done by any documents which are evidence of the property which the infured has in the fhip or goods infured, and of the value of that property; fuch as bills of fale, bills of lading, invoices, and proof that the goods were on board (*c*), bills of charges of the out-fit, cuftom-houfe clearances, &c.; and any deficiency in this fpecies of proof may be fupplied by parol evidence. So, if the infured have exercifed acts of ownerfhip, by directing the loading, &c. of the fhip, it has been holden that proof of the payment of the people employed, is fufficient proof of intereft in the fhip (*d*). How the intereft fhall be proved.

The rules of evidence in fuch cafes, where no fraud is fufpected, are not very rigidly adhered to:---Therefore where an action was brought upon a policy of infurance on a cargo of goods purchafed at *Peterfburgh*; the plaintiff, in order to prove his intereft, produced a *bill of parcels* from the vendor at *Peterfburgh*, with his receipt to it, and proved his hand-writing. The defendant objected that this was no evidence againft the underwriters: But Lord C. J. *Lee*, who tried the caufe, held it to be fufficient evidence of the plaintiff's intereft. *Ruffel* v. *B lim*, 2 *Str.* 1127. A bill of parcels with the vendor's receipt, for goods bought abroad, is fufficient proof of intereft.

In the fecond fection of this chapter (*e*) it has been fhewn that, in the declaration, the intereft may be averred either generally or fpecially; and that, under a general averment of intereft, the infured may prove any fpecies Upon a general averment of intereft the infured may prove any fpecies of intereft that is deemed infurable, in any *aliquot parts* of the thing infured.

(*a*) Vid. fup. 291.——(*b*) As to what fhall amount to an infurable intereft, *vid. fup.* ch. 4, *paffim*.——(*c*) Per Lord *Kenyon* in *M'Andrews* v. *Bell*, 1 *Efp.* Rep. 373. fup. 469.——(*d*) Per Lord *Kenyon*, at N. P. *Amery* v. *Rogers*, 1 *Efp.* Rep. 209, fup. 619.——(*e*) Sup. 682.

of intereſt he may have in the ſhip or goods inſured. It is alſo there ſhewn that it is unneceſſary to ſtate the *quantum* of the intereſt in the declaration; for as the plaintiff in aſſumpſit recovers according to the evidence *pro tanto*, he may under a general averment of intereſt in the entire thing inſured, prove an intereſt in any *aliquot part*, and recover damages for the loſs in proportion to ſuch part.

Upon a *valued policy*, it is only neceſſary to prove *ſome* intereſt.

If the policy be an *open* one, the real value of the plaintiff's intereſt muſt be proved;---if it be a *valued* one, it has been holden that the inſured needs only to prove *ſome* intereſt, to take the caſe out of the ſtat. 19 *G.* II. c. 37; becauſe the underwriter, by ſubſcribing the policy, has admitted the value there ſtated; and if more were required, the agreed valuation would ſignify nothing (*a*).

Yet the value in the policy is only *primâ facie* evidence, and may be diſputed.

And yet the value in the policy is only to be taken as *prima facie* evidence of the amount of the intereſt of the inſured. For though this value is admitted by the inſurer; yet, as he admits it upon the mere repreſentation of the inſured, if he find it to be fallacious, and that the ſpecified value was fictitious, and only a cover for a wager, it cannot be ſuppoſed that he is ſo far concluded by his admiſſion, as not to be at liberty to diſqute the value, and ſhew by evidence, that it was meant as a mere evaſion of the act (*b*).

Upon a policy on *goods*, a reſpondentia bond is no evidence of intereſt.

In an action upon a policy *on goods*, the plaintiff cannot give in evidence a *reſpondentia bond*, as proof of *intereſt* in the goods upon which the money was borrowed, though they were of greater value than the ſum inſured; becauſe bottomry and reſpondentia intereſts are always inſured *as ſuch*, and there is no inſtance of an inſurance on reſpondentia under the denomination of goods (*c*).---

In *Eaſt India* voyages the *lender* on bottomry can only inſure the ſum lent, and the borrower the ſurplus value of the goods.

Where money has been lent on reſpondentia on *Eaſt India* voyages, the ſtat. 19 *G.* II. c. 37, § 5, conſiders the

(*a*) Per Lord *Manſfield*, in *Lewis* v. *Rucker*, 2 *Bur.* 1171, ſup. 624.——(*b*) Vid. ſup. 288.——(*c*) R. *Glover* v. *Black*, 3 *Bur.* 1394. 1 *Bl.* 399, 405, 422. ſup. 317.

borrower,

borrower as having a right to insure only for the surplus value of the goods, above the money borrowed; and the lender as having a right to insure for the sum lent. If either were to insure for more, it would be a *wager* (*a*).

But the usage of a particular trade may sanction a departure from this rule---As where the captain of an *East Indiaman* made an insurance on "*goods, specie and* "*effects*" on board; he was permitted, in an action on his policy, to give in evidence of his interest, money which he had laid out in the course of the voyage, and for which he charged respondentia interest (*b*). But the usage of trade may sanction a departure from this rule.

It would seem, however, that, upon a policy on goods generally, the insured may be permitted to give in evidence of his interest, a mortgage or other special *lien* (*c*). An interest in goods may be proved by a mortgage or other special *lien*.

In an action upon a policy on bottomry or respondentia securities, evidence of the execution of the bottomry or respondentia bond, and of the interest of the obligor in the ship or goods, is sufficient proof of interest in the insured; and in such case, the obligor himself is a competent witness to prove his own interest in the ship or goods on which he borrowed the money (*d*). The execution of a bottomry bond, and the interest of the obligor, are sufficient proof of interest in the obligee; and the obligor may prove his own interest.

Upon a policy upon a ship, the possession of the insured, as owner, is *primâ facie* evidence of property, until further evidence be rendered necessary in support of the title thus made, in consequence of its being impeached by contrary proof on the other side. Proof of possession is *primâ facie* evidence of title to a ship.

Therefore, where it was proved by the captain that the insured were the persons by whom, as owners, he was appointed and employed; this was holden to be sufficient evidence of ownership, though it afterwards appeared by his answers, on cross examination, that the ownership *Robertson* and anr. v. *French*, 4 *East* 136.

(*a*) Per Lord *Mansfield*, s. c. 3 *Bur*. 1400.——(*b*) Vid. *Gregory* v. *Christie*, sup. 272.——(*c*) Semb. *Glover* v. *Black*, 1 *Bl*. 423. sup. 317.——(*d*) Vid. 1 *Bl*. 396.

was derived to the insured under a bill of sale executed by himself, as attorney to one *L. W.* the former owner. For it did not, on that account, become necessary for the insured to produce that bill of sale, or the ship's register, or to give any further proof of their property; these documents being perfectly consistent with a title in the insured.

Marsh v. Robinson, 4 *Esp* Rep. 98.

One of several interests may declare on a policy, and aver himself sole owner.—A verbal appointment of the captain is *primâ facie* evidence of ownership.—No person can have an insurable interest in a ship, unless he be upon the register.

So, where a ship was insured in the name of "*Elizabeth* "*Marsh* and son," and the son brought an action on the policy in his own name only, and averred in the declaration that he was solely interested; and, to prove this, he called the captain, who swore that he had been employed by the plaintiff who verbally ordered him to take the command, to pay the seamen, and draw bills on him on account of the ship.---It was objected, 1st, that the averment in the declaration did not enable the plaintiff to prove a sole interest in himself; and, 2dly, that the evidence of the captain was not sufficient to establish that fact; as the orders given by the plaintiff might have been given by an agent or broker.---But Mr. Justice *Le Blanc*, who tried the cause, overuled both objections, and held that the acts done by the plaintiff were *primâ facie* evidence of sole ownership, and sufficient to call on the defendant to prove the contrary. The defendant then shewed that at the time when the policy was effected the ship stood registered in the names of *Cummins*, *M'Masters* and Co., and that there was no change in the registry till after the policy was effected.---Mr. Justice *Le Blanc* held this to be conclusive against the plaintiff's title, the stat. 26 *G.* III. c. 60. (Lord *Liverpool*'s act) requiring that, where there is a change of owners, there shall be an indorsement on the certificate, accompanied by the oath of the parties; and that till this is done a purchaser has no insurable interest (*a*).

Though the sentence of a court of prize, sitting in a neutral country, be illegal; yet, if the neutral country acquiesce in it, a

With respect to ships, it has been determined in the

(*a*) Vid. *Camden* v. *Anderson*, sup. 65, 115.

High

High Court of Admiralty (*a*), that a ſentence of condemnation pronounced by a court of prize, ſitting in a neutral country, was illegal; and that a ſale under ſuch ſentence would not transfer the property to a neutral vendee.--- This decision, and the reaſons upon which it was founded, were afterwards recogniſed in the court of King's Bench, where it was holden that a condemnation by a *French* conſul at *Bergen* in *Norway* had not the effect of diveſting the property of a captured ſhip out of the original owner (*b*). Since then Lord *Kenyon*, in a caſe at *niſi prius*, ſaid that, though he approved of that deciſion, yet where the neutral country acquieſced, and permitted the court of prize of a foreign belligerent to exerciſe its functions there, it varied the caſe; and that a *Britiſh* ſubject might derive a title to a ſhip under a ſentence pronounced by ſuch court (*c*).---But it is not eaſy to diſcover a good ground of diſtinction between theſe caſes.

title to a ſhip may be derived under its ſentence.

4. *Proof of Compliance with Warranties.*

Every material averment in the declaration muſt be proved. One of the moſt material is that of the truth of ſuch affirmative warranties, and the peformance of ſuch executory ones, as are contained in the policy; ſuch as, that the ſhip or goods inſured were neutral property; that the ſhip ſailed within the time limited by the policy; that ſhe departed with convoy; that ſhe was of the force warranted; that ſhe was manned with the ſtipulated complement of men, &c.—Such averments muſt be ſtrictly and literally proved; for theſe warranties being in nature of conditions precedent, the compliance with them is an eſſential part of the plaintiff's title; and a non-compliance with any warranty contained in the po-

The truth of affirmative, and the performance of executory, warranties, muſt be ſtrictly and literally proved.

(*a*) Vid. Caſe of the *Flad, Owen*, 1 *Rob.* Adm. Rep. 135, ſup. 389.——(*b*) Vid. *Havilock* v. *Rockwood*, 8 T. R. 268, ſup. 596.———(*c*) Vid. *Smith* v. *Surridge*, 4 *Eſp.* Rep. 25.

licy,

licy, to whatever caufe this may be imputable, and whatever may have been the caufe of the lofs, deprives the infured of all claim to the indemnity meant to be fecured to him by the contract.

Proof of neutral property.

In the cafe of a warranty that the thing infured is *neutral property*, it is ufual at the trial to give general evidence of the truth of that warranty; and leave it to the defendant to falfify it, or prove a breach or forfeiture of it. The evidence adduced by the defendant, for this purpofe, is ufually a fentence of condemnation as prize by one of the belligerent powers, either on the ground of the thing infured having originally been enemy's property, or becaufe the fhip, by fome mifconduct, had forfeited her neutrality. Copies of the fentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed fufficient evidence of the fact of condemnation, and of the grounds upon which it proceeded (*a*).

5. *Proof of the Lofs.*

The true caufe of the lofs muft be fet forth in the declaration.

The accident or misfortune which was the caufe of the lofs muft, as we have already feen (*b*), be diftinctly and explicitly fet forth in the declaration, in order that the infurer may have notice of the cafe againft which he is to prepare his defence.

The lofs muft be proved to have happened during the continuance of the rifk.

To charge the infurer, the lofs muft appear to have happened during the continuance of the rifk; and cafes have frequently occurred in which this was the principal queftion. What fhall be the commencement and duration of the rifk has been already fully treated (*c*); and

(*a*) Vid. fup. ch. 9, § 6. n. 2, where it is fully fhewn in what cafes the fentence of a foreign court of admiralty fhall have validity in our courts, and be deemed conclufive evidence to falfify this warranty. Confult alfo the other fections of the fame chapter.——(*b*) Sup. 687.——(*c*) Sup. 246.

little

little need be added here upon this ſubject. Suffice it to ſay, that in the caſe of a *ſhip*, if ſhe be inſured *from* a place, it will be ſufficient to prove that ſhe weighed anchor, or broke ground, in order to ſail on the voyage inſured. If the inſurance be *at and from* a place, the riſk commences from the time of ſubſcribing the policy, if the ſhip be at home; or from the firſt moment of her arrival at the place ſpecified, if that be in a diſtant part of the world.—If the riſk on the ſhip be from the loading of the goods on board, then proof that any part of the cargo has been ſhipped, will be evidence of the commencement of the riſk.

In the caſe of a *ſhip*.

If the inſurance be on goods, the underwriter may, if he think proper, call on the inſured to prove that they were put in riſk. This may be done by the teſtimony either of the perſons who ſhipped them, or of thoſe who received them, on board the ſhip mentioned in the policy. But the beſt evidence of this is the bill of lading, which, if *bonâ fide* made, is in all countries conſidered as an authentic document, and concluſive evidence of the quantity and ſpecies of goods laden on board; becauſe the captain, who muſt exhibit it on his arrival at the port of deſtination, is intereſted that it ſhall not include more in it than he has on board to deliver.—It is, as *Valin* juſtly obſerves, the true and ſpecific proof of the loading, and not only evidence, as between the captain and the merchant, but alſo againſt inſurers and all others (*a*). —The underwriter may, however, impeach the bill of lading on the ground of fraud or colluſion. But the inſured cannot allege any thing in contradiction to it.

In the caſe of *goods*.

The loſs may be proved by the parol teſtimony of the maſter, officers, and crew of the ſhip, or by any other legal evidence that can be adduced for that purpoſe.

The proteſt of the captain, ſo long as he is living, is in no caſe evidence on the one ſide or the other; the only uſe that can be made of it is to contradict his teſtimony, if he

A proteſt is not evidence, while the perſon who made it is living.

(*a*) *Valin*, h. t. p. 604. Vid. *Pothier*, h. t. n. 144. *Emerig.* t. 1, p. 314.

he vary from it. And its being ſhewn by the insurance broker to an underwriter as containing an account of the loſs, for which the inſured claimed, will not make it evidence even againſt the inſured whoſe broker thus produced it.

Senat v. Porter, 7 T. R. 158.

The broker's ſhewing it to an underwriter, with other papers relating to the loſs, on demanding payment, will not make it evidence againſt the inſured.

Thus:—An inſurance broker applied to an underwriter for payment of a loſs, producing the different papers relating to the ſubject, and, among the reſt, the proteſt ſigned by the captain. The underwiter told him he had looked into the papers, and as there was a point in the caſe, he would not pay the loſs. In an action on the policy, it was contended on the part of the defendant, that the proteſt was made evidence by the plaintiff, as a paper delivered by his agent to the defendant, containing an account of the loſs on which he reſted his claim; and therefore, that it amounted to a declaration made by the plaintiff to the defendant of the facts on which he required payment.---Lord *Kenyon*, who tried the cauſe, being of opinion that the proteſt was not admiſſible evidence, the plaintiff obtained a verdict.—On a motion for a new trial, the court were clearly of opinion that the proteſt, of itſelf, could not be evidence; and its having been in the broker's hands, and ſhewn by him to the defendant, on an application for payment, would no more render it evidence, than a bill in equity could be made evidence againſt the plaintiff, becauſe its contents muſt have been ſhewn to the defendant.

If a loſs by capture be alleged, the plaintiff cannot prove a loſs by perils of the ſea.

The loſs muſt appear to have ariſen from the very cauſe alleged in the declaration, and no other. If, therefore, a loſs be alleged in the declaration to have been occaſioned by *capture*, the plaintiff cannot, under ſuch an averment, prove a loſs by the *perils of the ſea*, or by any other cauſe than capture (*a*).

If a mob board a ſhip and run her on ſhore, whereby goods are loſt; this is a loſs by ſtranding, and not by *detention of people* or by *pirates*.

So, if there be two counts in the declaration, one for a loſs by *detention of people*, the other for a loſs by *pirates*; the plaintiff cannot, on either of theſe counts, give in evidence that a mob of rioters had boarded the ſhip, in

(*a*) Vid. *Kulen Kemp* v. *Vigne*, 1 T. R. 304. ſup. 130.

order

order to compel the captain to ſell a cargo of corn at an inferior price; and that in conſequence of this boarding, the ſhip was ſtranded and a quantity of corn loſt. This could only be given in evidence upon a loſs by *ſtranding* (*a*).

Though it is a maxim in law that fraud ſhall never be preſumed, but muſt be ſtrictly proved; and it is a rule, founded on that maxim, that in queſtions of inſurance, he who charges barratry, muſt ſubſtantiate it by concluſive evidence (*b*); yet it has been determined that proof of the captain's having carried the ſhip out of the regular courſe of the voyage, for fraudulent purpoſes of his own, is, *primâ facie*, ſufficient to entitle the plaintiff to recover as for a loſs by barratry; without ſhewing negatively, that he was not the owner, or that this was not done with the owner's conſent (*c*).

Proof that the captain was guilty of barratry, is ſufficient without ſhewing, negatively that he was not owner, &c.

No evidence can be given of any loſs unleſs it be the *immediate* conſequence of ſome peril inſured againſt. That which is only a remote conſequence of ſuch peril is not within the policy. If this rule were not adhered to, it would be impoſſible to draw the line, and the inquiry into the remote conſequences of an accident or miſfortune would be infinite.

Every loſs muſt be an immediate conſequence of ſome of the perils inſured againſt.

Therefore, where the plaintiff, upon a policy on ſlaves in the *African* ſlave trade, declares for a loſs by *the perils of the ſea*, he cannot give in evidence a loſs occaſioned by throwing ſlaves overboard on account of a ſcarcity of water, occaſioned by the captain's miſtaking his courſe (*d*); nor a loſs by the death of ſlaves who periſhed for want of proper food, occaſioned by extraordinary delay in the voyage ariſing from bad and tempeſtuous weather (*e*).

In the caſe of ſlaves.

So, where an inſurance was made on a ſhip and cargo, in the ſlave trade, ' At and from *Briſtol* to the coaſt of *Africa*,

Jones v. *Schmoll*, at N. P. Trin. Vac. 1785, 1 T. R. 130, n.

Slaves are inſured againſt mortality by *mutiny*: and, in a mutiny, ſome are killed, others die of their wounds, others of chagrin, &c. The inſurer is liable for theſe

(*a*) R. *Neſbit* v. *Luſhington*, 1 T. R. 783, ſup. 230, 504.—(*b*) *Baratariæ crimen nunquam eſt preſumendum, ſed concludentiſſimè probandum.* *Caſaregis*, diſc. 1, n. 60; diſc. 225, n. 99. Vid. *Emerig*. tom. 1, p. 372.—(*c*) R. *Roſs* v. *Hunter*, 4 T. R. 33, ſup. 531.—(*d*) R. *Gregſon* v. *Gilbert*, ſup. 491, 554.—(*e*) R. *Tatham* v. *Hodgſon*, 6 T. R. 656, ſup. 491.

who were killed or mortally wounded, in the mutiny; but not for those who died from other causes, though the *remote* consequences of the mutiny; nor for the diminution in value occasioned by the disposition manifested by the mutiny.

'*Africa*, during her ſtay and trade there, and from thence to 'her port or ports of diſcharge in the *Weſt Indies*.' There was a memorandum on the policy, in theſe words;—'The inſurers are not to pay any loſs that may happen 'in boats during the voyage, (mortality of negroes by 'natural death excepted) and not to pay for mortality 'by *mutiny*, unleſs the ſame amount to 10l. *per cent.* to 'be computed upon the firſt coſt of the ſhip, out-fit, and 'cargo, valuing negroes ſo loſt at 25l. *per* head.'—In an action upon this policy, the demand was for the value of a number of ſlaves *loſt by mutiny*.—The evidence of the captain was that he had ſhipped 225 prime ſlaves on board; that on the 23d of *May*, before he ſailed from the coaſt of *Africa*, an inſurrection was attempted; that the women ſeized him on the quarter-deck, and attempted to throw him overboard, but he was reſcued by the crew; that the women, and ſome men, threw themſelves down the hatchway, and were much bruiſed; and 12 men and a woman died of their bruiſes, and from abſtinence; that there was a general inſurrection, and the crew were from imminent neceſſity, obliged to fire upon the ſlaves, and attack them with weapons; that ſeveral ſlaves took to the ſhip's ſides, and hung down in the water, by the chains and ropes; ſome for about a quarter of an hour; that ſeveral were killed by firing, ſeveral wounded, ſeveral died from ſwallowing ſalt water, or of their wounds, or from bruiſes, ſome from chagrin at their diſappointment, ſome from abſtinence, ſome from fluxes and fevers,—in all to the amount of 55, who died during the voyage.—The underwriters had paid for 19, who were either killed during the mutiny, or died of their wounds, which amounted to 15 *per cent.* For the plaintiff it was contended that, though the reſt did not actually die in the mutiny, or of any wounds received at that time; yet, as they had all died *in conſequence* of the mutiny, the underwriters were liable. Another conſequential loſs was, that the circumſtance of the mutiny had ſo leſſened the value of the ſlaves, in the eſtimation of the planters, that they were ſold for 17l. a head leſs than they would otherwiſe have fetched.—Lord *Mans-*

field,

field, who tried the cauſe, ſaid;—"I think the underwriters not anſwerable for the loſs of the market, or the price of it: That is a *remote* conſequence, and not within any peril inſured againſt by the policy. The queſtion for the jury will be, whether any of thoſe, who died by any other means, except the being fired upon, or in conſequence of the wounds and bruiſes which they received during the ſtruggle, are within the meaning of the policy, which inſures againſt damage by mutiny. It is very clear that thoſe who were killed by the firing, or died in conſequence of their bruiſes during the mutiny, are within the policy; the other complicated caſes muſt be left to the jury. I think, clearly, thoſe *not* within the policy, who, being baffled in their attempts, in deſpair, choſe a mode of death, by faſting, or died through deſpondency. That is not a mortality by mutiny, but the reverſe; for it is by the failure of a mutiny—The great claſs are ſuch as received ſome hurt by the mutiny, but not mortal, and died afterwards from other cauſes; as thoſe who ſwallowed ſalt water, jumped overboard, &c."—This is the great point."—The jury found,—that all who were killed, or died of their wounds or bruiſes, which they received in the mutiny, though accompanied with other cauſes, were to be paid for: But, that all who had died by ſwallowing ſalt water, or leaping into the ſea, or hanging upon the ſides of the ſhip, without being otherwiſe bruiſed, or died of chagrin, were not to be paid for.

Green v Elmſlie, at N. P. Peake, 212.

A ſhip is driven by *ſtreſs of weather* on an enemy's coaſt, and there captured. This is a loſs by *capture*, not by the perils of the ſea.

So, where the ſhip *Fly* was inſured from *Exeter* to *London*, againſt *capture* only; and the ſhip on her voyage was driven by a gale of wind on the coaſt of *France*, and there captured by the enemy.—In an action on the policy it was contended on the part of the defendant, that this was a loſs by the *perils of the ſea*, and not by capture.—But Lord *Kenyon*, who tried the cauſe, held that this was clearly a loſs by capture; for had the ſhip been driven on any other coaſt than that of an enemy, ſhe would have been in perfect ſafety. The jury, under this direction, found a verdict for the plaintiff.

Upon a declaration for a loſs by *fire*, the plaintiff may prove that the captain

If the plaintiff declare upoa a loſs by *fire*, in order to prevent the veſſel and her cargo from falling into the

 hands

set fire to the ship, to prevent her falling into the hands of the enemy.

hands of the enemy, he may prove that the vessel being pursued by a privateer, the captain and crew discharged her guns down her hatchway, and having set her on fire in several places, left her, and rowed ashore in the long-boat (*a*).

Carey v. *King*, Ca. temp. *Hard.* 304.

The plaintiff may give in evidence any loss immediately proceeding from the cause alleged.

But the plaintiff may give in evidence any loss or damage which is an immediate consequence of the accident or injury alledged in the declaration.—As where it was averred in the declaration, that the ship sprung a leak and sunk in the river, whereby the goods were spoiled: And the evidence was, that many of the goods were spoiled, but some were saved. The question was, whether the plaintiff might give in evidence the *expence of salvage*, though not particularly stated in the declaration, as a breach of the policy.—Lord *Hardwicke* said,—" I think they may give it in evidence; for the insurance is against all accidents. The accident laid in the declaration is, that the ship sunk in the river: It goes on and says, that by reason thereof the goods were spoiled. This is the only special damage laid: Yet it is but the common case in a declaration that lays special damage, where the plaintiff may give in evidence any damage that is within his cause of action as laid. It was objected that such a breach of the policy should be laid that the insurer may have notice to defend it. Now it is so in this case, for they have laid the accident, which is sufficient notice, because some damage must have happened."

But it must be a direct and immediate consequence of the cause alleged.

The loss must appear not only to have proceeded from the very cause alleged in the declaration, but also to be a direct and immediate consequence of the accident or misfortune which has happened to *the very thing insured*. Therefore an expence which is incurred in consequence of the accident or misfortune stated in the declaration, but which is not incurred in repairing the damage occasioned by it, cannot be given in evidence as proof of the loss within the meaning of the policy.

(*a*) Per Lord *Ellenborough*, at N. P. *Gordon* v. *Rimmington*, 1 *Camp*. Rep. 123. Vid. sup. 494.

As

loſſes have been ſettled, the proviſions put on board the veſſel, when ſhe failed, have been conſidered as *part of the ſhip*. The value of the ſhip alone comprehends the hull, the maſts, the tackle, and the *proviſions*. Then, if the proviſions be included in a policy on the ſhip, and all the proviſions be loſt, the underwriters muſt make good the whole loſs, whether it be a valued or an open policy. But it has been ſaid, that if an accident happen after ſome of the proviſions are conſumed, the underwriters are entitled to a deduction to the amount of ſuch proviſions: I will anſwer this, as the argument applies, firſt to a valued, and then to an open policy. As to the firſt: From the nature of the policy, the proviſions are not inſured againſt all events; they are only inſured againſt particular riſks. Again, there is nothing from which there can be ſalvage: If the body of the ſhip, and every thing on board, be ſunk, or burned, there can be no ſalvage. And, in caſe of an open policy, the inſured muſt prove, by evidence, what was the value of the whole; and then the ſame reaſons apply as in the caſe of a valued policy. With reſpect to the caſe of *Robertſon* v. *Ewer*, I thought at firſt that it applied ſtrongly to the preſent; and if I ſtill entertained the ſame opinion, I would not, on account of any uſage to the contrary among underwriters, overturn a ſolemn determination of this court: But that caſe, and the two others there mentioned, are clearly diſtinguiſhable from the preſent.—In all thoſe caſes the inſured wiſhed to charge the underwriters with the amount of the proviſions conſumed, during the time when the ſhips were detained. Of thoſe, therefore, it is ſufficient to ſay, that an inſurance is on the ſhip *for the voyage*; but during a detention, the ſhip is not proceeding; and therefore the underwriters are not liable (*a*). This caſe alſo differs from *Robertſon* v. *Ewer* in another circumſtance: There, the proviſions were con-

(*a*) There muſt be ſome miſtake of the reporter in this place. It cannot be ſuppoſed that the learned judge ever meant to ſay, that while a ſhip is detained, ſhe is not under the protection of the policy.

ſumed by the ſlaves on board, and not by the ſhip's crew, and the ſlaves are conſidered as a part of the cargo. The words of Lord *Mansfield*, in that caſe, muſt be taken with reference to the caſe then before him. He was then ſpeaking of a charge for proviſions and during the detention of the ſhip, and for the maintenance of the ſlaves; and he ſaid;—"There is no authority to ſhew that, on "*this* policy, the inſured can recover for *ſuch a loſs*; but "it is contrary to the conſtant practice." Then he proceeded to ſay that, on a policy on a ſhip, ſailor's wages or proviſions are never allowed in ſettling the damages. Now, even if thoſe latter words be taken in their general ſenſe, and not confined to the caſe immediately before the court, they are accurate; for proviſions, *eo nomine*, are not taken into conſideration.—If the captain be obliged, in conſequence of the detention, to purchaſe other ſtores for the remainder of the voyage, the underwriters are not anſwerable for theſe; but only for thoſe which were on board at the time of the inſurance, ſince they only formed a part of the value of the ſhip.—The uſage of merchants, as to the conſtruction of theſe inſtruments, ſtands unimpeached, and therefore it muſt prevail in this caſe."

When the expence of wages and proviſions ſhall be a general, when a particular, average.

By the law of *France* (*a*), the expence of wages, and proviſions of the ſeamen, during a detention, are reputed a *groſs*, or *general average*, if the ſhip was hired *by the month*; but if hired *for the voyage*, this expence is borne by the ſhip alone, as a ſimple average.—*Pothier* (*b*) gives the following reaſon for this diſtinction. The wages of the ſailors being included in the freight, when the ſhip is chartered *for the voyage*, the owner, who receives freight for the whole voyage, is bound to ſupply the labour of the ſailors for the whole time of the voyage, of which the time of the detention makes a part.—On the other hand, when the ſhip is chartered *by the month*, the owner, receiving no freight during the detention, owes no ſervice of the ſailors to the affreighter. The affreighter therefore, ought, in conſideration of the be-

(*a*) Ord. de la mar. tit. *des avaries*, art. 7. Vid. *Emerig*. tom. 1, p. 539.——(*b*) Tit. *des chartes parties*, n. 85.

nefit he derives from the labour of the ſailors, to pay for their labour and proviſions during the detention.

But the uſage of trade often controls the general conſtruction of the policy; and what ſhall or ſhall not be protected as part of the ſhip and furniture depends, in ſome caſes, on the uſage of a particular trade.

But the uſage of trade often determines what ſhall be deemed part of the ſhip.

As where an inſurance was made, in the uſual form, on a ſhip employed in the *Greenland* fiſhery; and, in an action on the policy, the queſtion was, whether the *fiſhing-tackle* was included in the inſurance on the *ſhip, furniture*, &c.—Lord *Mansfield*, who tried the cauſe, ſaid, that there was no doubt but that the boats, and rigging, and ſtores, belonging to the ſhip, were included; and as to the fiſhing ſtores, it muſt depend on the *uſage of the trade*. On this, there was contradictory evidence. The plaintiff, however, obtained a verdict, which the court afterwards ſet aſide, and granted a new trial, upon the ground that the evidence of the uſage was principally in favour of the defendant.

Hoſkins v. Pickerſgill, E. 23. G. III. B. R. MS.

Whether the fiſhing tackle in the *Greenland* whale fiſhery be included in a policy on the ſhip, depends on the uſage of the trade.

In a former chapter we had occaſion to obſerve that the *captain's clothes*, the *ſhip's proviſions*, and *goods laſhed to the deck* are not comprehended under the general denomination of "*goods, wares, and merchandizes*," in the policy; and that the inſurer is not, therefore, liable for any loſs on theſe articles unleſs they be ſpecifically named (*a*).

The *captain's clothes, the ſhip's proviſions, and goods laſhed to the deck*, are not within a policy on *goods*.

Therefore, where an action was brought on a policy on *goods*, the property of the captain, for ſix months, the loſs proved was chiefly for *goods laſhed to the deck*, the captain's *clothes*, and the *ſhip's proviſions*.—On the part of the defendant it was proved by an underwriter and a broker, that none of theſe things are within a general policy on *goods*; becauſe the riſk is greater, as to goods laſhed on deck, than on other goods; and that a policy on goods generally, means only ſuch goods as are merchantable, and a part of the cargo. They alſo ſwore that when goods like the preſent are meant to be inſured, they are always inſured by name, and the pre-

Roſs v. Hunter, at N. P. after Hil. 16 G. III. *Park* 20.

(*a*) Vid. ſup. 319.

mium is greater.—Lord *Mansfield* said he thought it consistent with reason, and understood the usage to be so; and therefore the plaintiff withdrew a juror, the premium having been paid into court.

The insured on *goods*, is not entitled to freight paid *pro rata itineris*, during capture.

In an action on a policy on *goods*, the insured cannot recover for freight *pro rata itineris* paid by the owner of the goods to the owner of the ship; where the ship is captured and detained by a foreign power, and afterwards restored.

Tullie v. *Moligrant*, Hil. 25. G. III. B. R. MS.

Goods are insured, the ship and goods are captured and sold, but the sentence reversed, and the proceeds ordered to be paid to the owners:—The freight *pro rata itineris*, paid by the owner of the goods, is not a charge for which the insurers on the goods are liable.

Thus: In an action on a policy on goods, 'At and 'from *Nevis* to *Bristol*,' it appeared that the ship on her voyage was captured by the *French*, carried into *Morlaix*, and there condemned. Upon an appeal to the parliament of *Paris*, this sentence was reversed, and the ship and cargo were decreed to be restored; or the net proceeds thereof, if sold, to be paid to the claimants. The ship and cargo having been sold before this sentence was obtained, the money, after deducting all charges, was remitted to the plaintiff, who was agent for the owners of the ship, for the owners of the goods, and for the underwriters.—The underwriters paid the charges of the suit, and all other expences. The plaintiff (the common agent) paid to the owners of the ship, freight *pro rata itineris*; and the question was, whether he was to be reimbursed by the owners of the goods, or whether this was a loss within the policy, for which the underwriters were liable.—The court, after time taken to deliberate, were unanimously of opinion, that the underwriters were not liable to this charge.—Lord *Mansfield* said;—"The question is, whether the owner of the goods can charge the underwriters with this *item*, which was paid for freight *pro rata itineris*, by the owners of the goods to the owners of the ship. As between the owners of the ship, and the owners of the cargo, in case of a total loss, no freight is due: But, as between *them*, no loss is total, where part of the property is saved, and the owner takes it to his own use. Here the value of of the goods was restored in money, which is the same as the goods: and therefore freight was certainly due *pro rata itineris*. But, as between the insured and the underwriters

As where a ſhip was inſured, ' At and from *London* to ' *Newcaſtle* and *Marſeilles*, and from thence to the *Weſt-* ' *Indies*.'—The ſhip, in diſtreſs, bore away for *Minorca*, where it being found neceſſary to repair her, ſhe was unavoidably detained there a conſiderable time.—The inſured brought an action on the policy, to recover the extraordinary *wages and proviſions* expended during this detention: But Lord *Mansfield*, who tried the cauſe, was of opinion that ſuch a demand could never be allowed as a charge againſt the inſurer *on the ſhip*; and a verdict was accordingly given for the defendant.

Fletcher v. *Poole*, at N. P. after Eaſt. 1769, *Park* 52.

Wages and proviſions expended during a repair of ſea-damage, is not a loſs within a policy on the *ſhip*.

So, where an inſurance was made ' on *ſhip and goods*, ' from *Oſtend* to *Dominique*.'—The ſhip in her voyage having met with bad weather, and being in great diſtreſs, the crew threatened to take the command from the maſter, unleſs he would make for the firſt port. The maſter bore away for *Ferrol* to repair the ſhip; but by the time the repairs were finiſhed, the crew deſerted her. He then got another crew, and at the moment he was going to ſail, the *Spaniſh* governor ſtopped him, and after detaining him 37 days, diſcharged him, and he proceeded on his voyage, and at length arrived at *Dominique*.—An action was brought on the policy to recover the loſs incurred by *wages, proviſions*, and *demurrage*, during the ſhip's detention at *Ferrol*. On the part of the underwriters it was contended that the *freight*, and not the ſhip, is liable for this loſs, and that the charge of demurrage could not be allowed upon this policy.—Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and non-ſuited the plaintiff.

Eden v. *Poole*, at N. P. after Hil. 1785, *Park* 54.

Upon a policy on *ſhip and goods*, the inſured cannot recover for wages proviſions or demurrage, during a ſhip's ſtay for repair, and detention by a foreign power.

So, where a *ſhip* was inſured, ' At and from *London* ' to *Africa*, during her ſtay and trade there, and to her ' port of diſcharge in the *Weſt Indies*;'—the ſhip on her voyage from *Africa*, with a cargo of ſlaves, to her port of diſcharge in the *Weſt Indies*, touched at *Barbadoes* for the purpoſe of watering, where ſhe was detained a conſiderable time by an embargo, which had been before laid by the commander in chief on all ſhips at that iſland. The captain applied for leave to depart, and being refuſed, he ſailed without leave, but was purſued by a ſloop

Robertſon v. *Ewer*, 1 T. R. 127.

The inſured upon a policy *on the ſhip*, cannot recover the expence of wages or proviſions occaſioned by a detention under an *embargo*.

of war, and after a ſlight engagement, brought back, and the crew diſtributed among the men of war. The embargo continued from the 18th of *December*, till the 27th of *January.* The ſmall pox broke out among the ſlaves on the 22d of *January*. In conſequence of all this, and for want of mariners to navigate the ſhip, ſhe was detained at *Barbadoes* above two months after the embargo was taken off. She then ſailed to *Jamaica*, her place of diſcharge.—In an action on the policy to recover the amount of the additional *wages and proviſions* occaſioned by the ſhip's detention under the embargo, Mr. Juſtice *Buller* was of opinion that this policy, being upon the body of the ſhip, and the average loſs thereon, excluſive of the charge for wages and proviſions, being leſs than 3 *per cent.*, the plaintiff was non-ſuited. Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiff, *firſt*, that this loſs, being occaſioned by the embargo for which the inſured might have abandoned, and recovered as for a total loſs, he might recover a partial loſs to the amount of the damage actually ſuſtained (*a*); and *ſecondly*, that this was a loſs occaſioned by the barratry of the maſter, by his reſiſtance to lawful authority.—But the court determined that the plaintiff had no right to recover on either ground.—Lord *Mansfield* ſaid,—"There is no authority to ſhew that, on this policy, the inſured can recover for ſuch a loſs; but it is contrary to the conſtant practice. On a policy on a *ſhip*, ſailor's wages, or proviſions, are never allowed in ſettling the damages. The inſurance is on the body of the ſhip, tackle, and furniture; not on the voyage or crew. Here it is admitted that no damage was done to the ſhip, tackle, or furniture; and therefore I think the direction was right, and that the plaintiff ought not to recover."—Mr. Juſtice *Buller* ſaid;—"If the ſhip had been detained in conſequence of an injury which ſhe had received in a ſtorm, though the underwriters muſt have made good the damage; yet the inſured could not have claimed

(*a*) Vid. *Rotch* v. *Edie*, 6 T. R. 425. ſup. 44, 511.

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the amount of wages or provisions, during the time spent in repairing. The court only look to the *subject matter of the insurance.* Here the ship was safe; and the wages and provisions are no part of the thing insured."

Yet a ship's provisions are considered as *part of the ship*, and are protected by the policy.

Yet, in the following case, which is not easily reconcilable with the three foregoing cases, it was the opinion of the court that a ship's provisions are protected by the policy, even when landed on a *Bank Saul* during a repair; and that they were to be considered as a *part of the ship.*

Brough v. *Whitmore*, 4 T. R. 206.

A ship's provisions, during a repair, are landed on a *Bank Saul*, and there consumed by fire: The underwriters on the ship and *furniture* are liable.

An insurance was made on a *China* ship, and, in the usual words, 'On the tackle, ordnance, ammunition, 'artillery, and *furniture* of the ship.—In an action on this policy, it appeared that while the ship was lying off *Bank-Saul Island*, in the river *Canton*, it became necessary to refit her, for which purpose, the stores and provisions were taken out of her, and put into a warehouse called a *Bank-Saul*, where they were destroyed by accidental fire.—At the trial, this accident was considered as if it had happened *on board the ship* (*a*), and it was admitted that the policy covered all the articles but the *provisions*; and if they were not protected by the policy, then there would not be a partial loss of 3 *per cent.*—On the part of the defendant it was contended that the provisions, which were merely for the ship's crew, were not protected by a policy on the *ship*. But one of the jury, observing that it had been determined in Lord *Mansfield*'s time, that they were included under the word '*furniture*,' and that the merchants in the city had ever since acquiesced in this decision, there was a verdict for the plaintiff.—On a motion for a new trial the above case of *Robertson* v. *Ewer* was relied on as a clear authority to shew that the ship's provisions were not protected by a policy on the ship; and that, if provisions were included in the term 'furniture,' there could never be a total loss, after a consumption of any part of them. —The court, however, were unanimously of opinion that the underwriters were liable for the expence of the pro-

(*a*) Vid *Pelley* v. *Roy. Ex. Ass.* 1 *Bur.* 341, sup. 269.

visions which were bought to replace those consumed by the fire, which was an accident within the words of the policy.—Lord *Kenyon* said;—" When it was stated, at the trial, that *provisions* were included in the word '*fur-* '*niture*' I confess I was somewhat at a loss to know to what extent the underwriters were liable on words so indefinite as those which are used. If the provisions be insured as part of the out-fit of the ship, and they were destroyed by one of the perils insured against, there is an end of the question; a loss has happened within the meaning of the policy, and consequently the defendant is liable. But it was said in the argument, that the instant any of the provisions were consumed on board, there could not be a total loss. But the answer is, that that comes within the *wear and tear of the ship*; and it might as well be said, that if a mast were a little injured, there could not be a total loss. The case of *Robertson* v. *Ewer* is clearly distinguishable from the present. Here the provisions were consumed by an accidental fire on board the ship, (for the island and the ship were, for this purpose, the same), and within the meaning of the policy; but, in that case, they were consumed *by the negroes*, during the detention of the ship (*a*)."—Mr. Justice *Buller* said, —" It is perfectly clear that, in every instance where

Distinctions between this case and that of *Robertson* v. *Ewer*.

(*a*) According to the Report of *Robertson* v. *Ewer*, Lord *Mansfield* laid it down as a general rule, not restricted to any particular trade, that on a policy on a *ship*, sailor's wages or *provisions* are never allowed in settling the damages; nor was it ever objected in that case, that the provisions had been consumed by the slaves. It is not likely, indeed, that such an objection could have been made; for it is well known, that the food provided for the slaves was part of the cargo, and very different from that which was provided for the ship's company; besides, the ship's company must have consumed a part. But, be this as it may, if it be necessary, in order to support the case of *Robertson* v. *Ewer*, to suppose that the provisions, for which the insured wanted to charge the underwriters, were *consumed by the slaves*, and not by the crew, then the cases of *Fletcher* v. *Poole*, and *Eden* v. *Poole*, where no such ground could be alleged, cannot be sustained.

losses

BOOK THE SECOND.

Of Bottomry and Respondentia.

THIS subject may be treated uuder the following distribution;

I. *Of the nature and form of the Contract;*
II. *Of the Parties to it;*
III. *Of the thing hypothecated;*
IV. *Of the principal and marine Interest;*
V. *Of the perils or risks to which the lender is liable;*
VI. *Whether he be liable to* general average;
VII. *Whether he be entitled to the* benefit of salvage.

CHAP. I.

Of the Nature and form of this Contract.

BOTTOMRY is a contract in nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed; and he pledges the keel or *bottom* of the ship, *pars pro toto*, as a security for the repayment: And it is stipulated that if the ship should be lost in the course of the voyage, by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal, and also the interest agreed upon, which is generally called the *marine interest*, however this may exceed the legal rate of interest (*a*). Not only the ship Bottomry defined.

(*a*) Vid. 2 *Bl.* Com. 458.

and

and tackle, if they arrive safe, but also the person of the borrower, is liable for the money lent and the marine interest.

Denomination. The contract of bottomry is called by the *French*, *contrat de prêt à la grosse avanture*, or *contrat à la grosse*. In *Le Guidon* (*a*) it is called *bomerie*, and *Molloy* (*b*) says that it is derived from *bomerie* or *bodmerie*, a *Flemish* word which signifies the *keel* or *bottom* of a ship.

Respondentia. When the loan is not on the ship, but on goods laden on board, which, from their nature, must be sold or exchanged in the course of the voyage, the borrower's personal responsibility is then the principal security for the performance of the contract, which is therefore called *respondentia* (*c*). In this consists the principal difference between bottomry and respondentia. The one is a loan upon the ship, the other upon the goods. The money is to be repaid to the lender, with the marine interest, upon the safe arrival of the ship, in the one case, and of the goods, in the other. In all other respects, these contracts are nearly the same, and are governed by the same principles. In the former, the ship and tackle, being hypothecated, are liable, as well as the person of the borrower; in the latter, the lender has, in general, only the personal security of the borrower.

Difference between them.

According to the *French* writers, the personal responsibility of the borrower is not, in all cases the only security of the lender. Where the money is lent for the outward and homeward voyages, the goods of the borrower on board, and the returns for them, whether in money, or in other goods purchased abroad, with the proceeds of them, are liable to the lender (*d*). But the following case shews, that in *England*, unless there be an express stipulation to that effect in the bond, the lender has no *lien* on the homeward cargo, nor any other security for his de-

(*a*) Ch. 18. —— (*b*) De jur. marit. b. 2, c. 11, § 12. —— (*c*) 2 *Bl.* Com. 458. —— (*d*) *Pothier*, h. t. n. 34. *Emerig.* tom. 2, p. 476. 561.

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mand than the perſonal reſponſibility of the borrower or his ſureties, if he has any.

Buſk v. *Fearon* & others, 4 *Eaſt* 31).

The lender upon a reſpondentia bond in the uſual has no *lien* or intereſt homeward purchaſed with the produce of the goods upon which the money was lent.

A reſpondentia bond, upon an *Eaſt India* voyage, was given by *Fearon* and *Douglas* in the uſual form (*a*); and the condition, after reciting 'that the money was lent 'upon the goods laden, *and to be laden*, on board the ſhip '*Belvedere* outward bound to *China*, was, that if the ſhip 'ſhould proceed on her voyage and return within 36 'months, (the dangers of the ſeas excepted) and if the 'borrowers, within 30 days after her arrival, ſhould pay 'to the lender the ſum lent, with the marine intereſt 'agreed on; or if, within the 36 months, the ſhip ſhould 'be loſt, and the borrowers ſhould, within ſix months 'after ſuch loſs, account for and pay to the lender a 'proportionable average on all goods carried out, and the 'net proceeds thereof, *and on all other goods which the bor-'rower ſhould acquire during the voyage, for or by reaſon of* '*ſuch goods*, and which ſhould not be unavoidably loſt, 'then the obligation to be void.'—The goods were diſpoſed of in *China*, and other goods purchaſed there with the produce thereof, with which the ſhip returned home, and arrived in the *Thames*. The goods ſo brought from *China* were depoſited in the warehouſes of the *India Company*, and *Douglas* being dead, and *Fearon* having become bankrupt,—the queſtion was, whether the lender had ſuch a *lien* upon, or intereſt in, the homeward cargo, or the proceeds thereof in the hands of the *Company*, as entitled him to claim it to the extent of his demand upon the bond.—The court determined that he had no ſuch *lien* upon, or intereſt in, the homeward cargo.

In uſe among the *Romans*.

Though it is extremely probable, as we have already ſhewn (*b*), that the contract of inſurance was unknown among the ancients, it is certain that the *Romans* were well acquainted with that of bottomry, or rather reſpondentia, which they denominated *nauticum fœnus* or *contractus trajectitiæ pecuniæ*; and it is treated of both in the *Digeſt* and the *Code*, *de nautico fœnore*. They called the ſum lent

(*a*) Vid. Appendix No. V.—(*b*) Sup. 5.

pecunia

Pecunia trajectitia.

pecunia trajectitia, perhaps becauſe the borrower was uſed to take the money on board with him in ſpecie, in order to employ it in trade in the courſe of the voyage; for ſuch was probably the original deſtination of ſuch loans among the *Romans*, who exported very little from *Rome*, but ſent money from thence to purchaſe the merchandiſe which the conſumption of that immenſe city demanded. The money thus lent was to be repaid, if the voyage proved fortunate, with a ſtipulated intereſt, which was called *periculi pretium*, ſometimes *uſura maritima*, or *uſura nautica*; but upon this condition, that if the ſhip ſhould be loſt by the perils of the ſea, in the courſe of the voyage propoſed, the lender ſhould loſe both principal and intereſt.

If the money was ſpent on ſhore, it was not *pecunia trajectitia*.

If the money was ſpent in the place where it was lent, it was not *pecunia trajectitia* (*a*). But if it was laid out in the purchaſe of goods, which were embarked at the riſk of the lender, then it retained its quality of *pecunia trajectitia*. So that, with the *Romans*, as with the moderns, it was of the eſſence of this contract that the loan ſhould be expoſed to the perils of the ſea, at the riſk of the lender.

Whether the *Roman nauticum fœnus* be materially different from the modern bottomry.

The author of *Le Guidon* (*b*) ſays that there is but little reſemblance between the contract of bottomry, as it is in uſe in modern *Europe*, and the *nauticum fœnus* of the *Romans*. But, with all due deference for the learned author of that treatiſe, it ſeems to me that, upon an attentive compariſon of the one with the other, it will be found that they are ſtill in principle the ſame; and only differ in the forms which modern regulations have given to the contract now in uſe.

How bottomry differs from a ſimple loan.

Bottomry differs materially from a ſimple loan. In a loan, the money is at the riſk of the borrower, and muſt be paid at all events. *Incendium ære alieno non liberat debitorem* (*c*). But in bottomry, the money is at the riſk of the lender during the voyage. Upon a loan,

(*a*) *Si eodem loco conſumatur, non erit trajectitia*, ff. *de naut. fœn.* 1.——(*b*) Ch. 18. art. 1.——(*c*) Cod. l. 11, *ſi cert. pet.*

only

underwriters *upon the cargo*, it is a contract of indemnity, and the latter have nothing to do with the *freight*. The owner of the ſhip has a lien for his freight; but in the caſe of a loſs, really total, no freight is due. In the caſe of a loſs, total as between the inſurer and inſured, with ſalvage, the owner may either take the part ſaved or abandon; but in neither caſe can he throw the freight upon the underwriters; becauſe they have not engaged to indemnify him againſt it, and have nothing to do with it."

The underwriters on goods are in no caſe liable for *freight*.

In aſſumpſit the plaintiff recovers damages according to the evidence *pro tanto*, and therefore he is not obliged to prove all the damages alledged in his declaration. Hence, though the plaintiff declare as for a *total loſs*, he may recover as for a *partial loſs*.—So, if he declare as for a total loſs of the entire thing inſured, when in fact he was only owner of, or intereſted in a *part* thereof, and the loſs be only partial, yet he ſhall recover his proportion of ſuch partial loſs to part.

If the plaintiff declare upon a total loſs, he may recover for a partial loſs.

So, if he declare for a loſs upon an *entire thing*, when he is only a part owner.

Thus:—An inſurance was made on *one fourth* of a ſhip; and the inſured declared expreſsly as for a *total loſs* of the ſhip; but the evidence only proved a partial loſs; nor was it attempted to prove a total one, the damage being ſo ſmall that it might have been repaired for 50l. —It was objected at the trial, on the part of the defendant, that evidence of a *partial loſs*, was not ſufficient to maintain a declaration for a *total loſs*, and it was ſuggeſted that the practice was contrary.—A verdict, however, was taken as for a partial loſs, ſubject to the opinion of the court on the above queſtion.—The court were clearly of opinion with the plaintiff.—Lord *Mansfield* ſaid;—"I was ſatisfied upon principles, provided the practice did not interfere; but, having heard of no determination in ſupport of the practice alleged, the caſe muſt ſtand upon principles; and, upon principles, it is clear that the plaintiff may, upon this declaration, recover as for a partial loſs. This is an action of *aſſumpſit*, which is a liberal action; and the plaintiff may recover *leſs* than his declaration would ſupport, though not *more*. There are two grounds of the plaintiff's declaration

Gardiner v. *Croaſdale*, 2 Bur. 904, 1 Bl. 198.

Upon inſurance of one *fourth* of a ſhip, plaintiff declares as for a *total loſs*; but proves only a *partial loſs*; he ſhall recover ſuch partial loſs.

claration; the policy, and the damage to the ship. Whether this be a total or a partial loss, is a question that goes to the *quantum of damages*, not to the *ground of the action*. The ground of the action is the same, whether the loss be total or partial; both are perils within the policy. As to the defendant's not coming prepared to defend a partial loss; this, indeed, would be an objection, if it were true: But the defendant does, in truth, come prepared to shew, either that no damage had happened at all; or, at least, that damage had not happened to the extent alleged.—Neither could the defendant have been hurt by a judgment by default; for the plaintiff could not have recovered upon the writ of enquiry, more damages than he could prove that he had actually suffered. If this objection were to prevail, it would introduce the addition of unnecessary counts in the declaration. In an ejectment for more, the plaintiff may recover less: It is every day's practice."—Mr. Justice *Denison* concurred, and said;—"In an action for damages, the plaintiff is to recover according to his proof, *pro tanto*; but he is not obliged to prove all that he has alleged. If it had been an action of covenant for pulling down a house, might not the plaintiff be entitled to damages for pulling down a part of it? This is no variance of the evidence from the declaration. The evidence tends, in a certain degree, to the proof of what is alleged in the declaration. Two counts would have been unnecessary."

Rising v. *Burnett*, at N. P. C. B. 12 *December* 1798. MS.

One of several part owners of a ship may insure the freight generally, without mentioning what share he has in the ship; and he may declare generally, and recover according to his interest.

So, where the plaintiff was one of four part owners of a ship, and each insured the freight without mentioning that it was only a *share of the freight* that he was interested in.—The plaintiff, in his declaration, stated his interest generally, and not as being an *aliquot* part of the ship.—It was objected on the part of the defendant, that the plaintiff should have alleged his interest according to the truth, and not in that general form. That the register of the ship, which was produced, was conclusive evidence as to the persons who were owners, and of their respective shares; and the register shewed that the plaintiff was only owner of the fourth part.—Mr. Justice *Buller*, who tried the cause, held, that this being an open

policy

policy (*a*), the plaintiff might recover according to his interest; and he had a verdict accordingly.

A fortiori if he prove a greater interest than he alleged.

So, if the plaintiff prove a greater interest than he alleged in his declaration, this shall not preclude him from recovering to the extent of the interest he has alleged.

Page v. *Rogers*, at N. P. after Hil. 1785, *Park* 402.

Thus, where the declaration stated that the plaintiff was possessed of *one third* of the ship insured; and it was proved that he had purchased the *whole* at one period; and there being no evidence to shew that he had since parted with any share of it, it was insisted that this was a variance.—But Lord *Mansfield* held that this was sufficient evidence; for, *omne majus continet in se minus*, and overruled the objection.

By 19 *G. II*, c. 32, if an underwriter become bankrupt before a loss happen, the insured may claim; and after a loss, prove his debt under the commission, and receive his dividend, as if the loss had happened before the bankruptcy.

By the preamble to the second section of the stat. 19 *G.* II. c. 32, it appears that, before the passing of that act, if an obligor in any bottomry or respondentia bond, or an insurer in any policy of insurance, became bankrupt before a loss happened, it was made a question whether the insured in such policy, or the obligee in such bond, could be let in to prove his debt, or to receive any dividend under the commission: But now, by that section, it is provided, 'That such obligee or insured 'shall be admitted to claim, and after the loss or contingency shall have happened, to prove, his debt, and 'to receive a dividend of the bankrupt's estate, in proportion to the other creditors; and that the bankrupt 'shall be discharged from the debt owing from him on 'such bond or policy, in like manner as if such loss or 'contingency had happened, and the money had been 'payable, before the issuing of the commission."

This statute extends to insurances upon lives.

As the words of the above preamble refer only to bottomry contracts, and insurances on ships and goods on board, it became a doubt whether it extended to *insurances upon lives*, though the words of the enacting part are general; and it was supposed that the legislature could

(*a*) Had it been a *valued policy*, it would have made no difference in this case; for the insurer may dispute the amount of the interest of the insured if it be over-valued, as well in an action upon a valued policy as upon an open one.

not

not have had insurance upon lives in contemplation, because the risk in such insurances may remain unsettled for many years:—But it has been determined that the general words of the enacting part are not restrained by the preamble; and that it comprehends *all insurances*, and consequenly insurances *upon lives* (*a*).

Sect. VI.

Of the Recovery back of Losses improperly paid.

If an underwriter, after he has paid a loss, discover fraud, which before he was not apprized of, he may maintain an action to recover back the loss so improperly paid.

IT sometimes happens that, after a loss has been paid, the underwriter discovers that there was fraud in the original contract, or that there were circumstances attending the loss, which, if known at the time the loss was claimed, would have justified his resisting the demand. In such case, he may maintain an action against the insured for money had and received to his use, to recover back the sum so improperly demanded.—But if, at the time he paid the money, he knew, or might, upon enquiry, have been informed of the grounds upon which he could have resisted the claim, he cannot afterwards bring an action to recover it back; for this would open a door to infinite litigation. A *fortiori* if the underwriter had paid the loss under legal compulsion (*b*).—If, however, after the insured has recovered the loss, by process of law, the underwriter receive intelligence of the fraud, which, by no possibility he could have known while the suit was depending, he may, in that case, I conceive, maintain an action to recover back the money so wrongfully obtained from him (*c*); for this would not be trying, in the new action, any ground of defence of which he might have availed himself in the first.

(*a*) R. *Cox* v. *Liotard,* B. R. Hil. 24 *G.* III. *Doug.* 166, n. Vid *Pattison* v. *Banks*, *Cowp.* 540; and *Mace* v. *Cadell*, *Cowp.* 232.——(*b*) R. *Marriott* v. *Hampton*, 7 T. R. 269. Semb. cont. *Moses* v. *Macfarlane*, 2 *Bur.* 1005. Vid. *Livesay* v. *Ryder*, *E.* 22. *G.* 3. B. R.——(*c*) Vid. *Pothier*, h. t. n. 14.

END OF THE FIRST BOOK.

only the legal intereſt can be reſerved: But upon bottomry, any intereſt may be legally reſerved which the parties agree upon.

Analogy between bottomry and inſurance.

The analogy between this contract and that of inſurance is much ſtronger. In the one the lender, in the other the inſurer, is liable to the perils of the ſea; the one receives the marine intereſt, the other the premium, as the price of the riſk, which varies in each according to the length and danger of the voyage. The lender and the inſurer are, in general, expoſed to the ſame perils, which have the ſame commencement and end. Both are entitled to the benefit of ſalvage, and liable to general average. The marine intereſt, like the premium of inſurance, is not due, if no riſk be run, though this be prevented by the voluntary act of the borrower.

How they differ

But though theſe contracts thus far agree, they differ eſſentially in many reſpects. In bottomry, the lender furniſhes the borrower with the money to purchaſe the goods which are put in riſk; an inſurer, on the contrary, furniſhes nothing of the ſubject matter of the inſurance.—The lender, in taking upon himſelf the riſk of the goods, does not contract any obligation to the borrower; a loſs by the perils of the ſea does not make him a debtor to the borrower, but only prevents the borrower from becoming his debtor: Whereas, upon a loſs happening, the inſurer becomes a debtor to the inſured to the amount of ſuch loſs, not exceeding the ſum inſured (*a*).—In caſe of ſhipwreck, the lender, by the general law, has a *lien* on the effects ſaved, to the extent of the ſum lent and the marine intereſt, *to the excluſion of the borrower*; whereas an inſured has an intereſt in the effects ſaved, *in common with the inſurer*, ſo far as he was uninſured.—The lender is not liable for particular average; but the inſurer is liable for this, unleſs he be exempt by expreſs ſtipulation.—By the clauſe, *free of average*, inſurers may be exempted from general average; but, in a caſe where the lender is liable by law to gene-

(*a*) *Pothier*, h. t. n. 6.

ral average, such a clause would be illegal and void (a). If the voyage be divisible into several distinct risks, the premium of insurance may be apportioned to each, and there may be a return for such as have not been begun; but, in bottomry, if the risk be once commenced, and no loss happen, the marine interest must be paid entire (b).

The utility of this contract.

This contract is of great utility in a country where the persons engaged in trade have not a sufficient capital to carry on their foreign commerce, by inducing those unskilled in trade to embark their money in it; and thus is formed a sort of partnership between the lender and the borrower, in which the one supplies capital the other skill and experience: The one takes upon himself the perils of the sea, and the other compensates him by a share of the profits of the adventure. But, except in this respect, this contract has no resemblance to a regular partnership, having in it no community of capital, no community of loss (c).

Not now much in use in this country.

Formerly the practice of borrowing money on bottomry and respondentia was more general in this country than it is at present. The immense capitals now engaged in every branch of commerce, render such loans unnecessary; and money is now seldom borrowed in this manner, but by the masters of foreign ships who put into our ports in need of pecuniary assistance to refit, to pay their men, to purchase provisions, &c. Sometimes officers and others belonging to ships engaged in long voyages, who have the liberty of trading to a certain extent with the prospect of great profit, but without capitals of their own to employ in such trade, take up money on respondentia to make their investments: But even this, as I am informed, is now not very frequently done in this country.

It is usually either in the form of a deed poll or a bond.

This contract, which must always be in writing, is sometimes made in the form of a deed poll, called a bill

(a) *Pothier*, h. t. n. 46; *Valin* on art. 16, h. t.; *Emerig.* t. 2, p. 505.——(b) *Emerig.* t. 2, p. 397.——(c) *Sav.* Dict. h. t. *Casaregis* disc. 7, n. 2; *Emerig*, t. 2, p. 394.

bill of bottomry, executed by the borrower (*a*), ſometimes in the form of a bond or obligation, with a penalty (*b*). But whatever may be its form, it muſt contain the names of the lender and the borrower, thoſe of the ſhip and the maſter; the ſum lent, with the ſtipulated marine intereſt; the voyage propoſed, with the duration of the riſk which the lender is to run: It muſt ſhew whether the money be lent on the ſhip, or on goods on board, or on both; and every other ſtipulation and agreement which the parties may think proper to introduce into the contract (*c*).

The marine intereſt muſt be expreſsly reſerved in it.

It is eſſential to this contract that the marine intereſt be expreſsly reſerved in it (*d*). *Straccha* (*e*), indeed, holds that, without this, the law would look upon the contract only as a ſimple loan, upon which the lender had gratuitouſly taken upon himſelf the perils of the ſea. *Emerigon*, however, holds (*f*) that this being a contract founded in good faith, equity will ſupply the omiſſions occaſioned by miſtake or inadvertence; and that, as the lender ſubjects himſelf to the perils of the ſea, and the borrower reaps the fruits of the adventure, commutative juſtice requires that the former ſhould receive, beſide the legal intereſt of his money, a ſatisfaction for the riſk he he has run.

Whether equity would ſupply the omiſſion of this.

(*a*) Vid. Append. No. VI.——(*b*) Vid. Append. No. VII. ——(*c*) Vid. *Pothier*, h. t. n. 30; *Emerig*. t. 2, p. 402.—— (*d*) *Pothier*, h. t. n. 19.——(*e*) Introd. n. 24.——(*f*) t. 2, p. 406.

CHAP II.

Of the Parties to this Contract.

Who may lend on bottomry.

THE parties to the contract of bottomry are the lender and the borrower. Of the former, it is sufficient to say, that any person, who is in a capacity to contract, may lend money on bottomry.

Who may borrow.

With respect to the borrower, every person who has a vested assignable property in a ship or cargo, may, by the general law of merchants, borrow money on bottomry or respondentia thereon, to the extent of his interest.

When the master may hypothecate the ship.

This contract seems originally to have arisen from the practice of permitting the master of a ship, in a foreign country, to hypothecate the ship, in cases of necessity, in order to raise money to refit (*a*). And it is essential to the safety of the ship and the success of the voyage, that the master, in the absence of the owners, should have this power, which is, indeed, by the marine law, implied in his appointment (*b*).

He can only do this in the absence of the owners.

But as the owners are presumed to give entire authority to the master, only in their absence, and for such affairs as they cannot themselves conveniently transact, he is not in fact master till after he sets sail. Till then, he is subject to their orders, and they have the power of dismissing him at pleasure; till then, therefore, he can transact no business of importance, but under their immediate directions (*c*). Hence, if the master borrow money on bottomry in the place where the owners reside, without their express authority, it can only affect his own interest on board.

Yet, if money borrowed where the owners reside be laid out on the ship, the owners shall be liable for it.

Yet, it is said that if the money thus borrowed be beneficially employed in supplying the necessities of the ship and in discharge of the owners, they are liable for the money thus laid out (*d*). But this liability must be understood as for money paid for their use, not upon the contract of bottomry.

(*a*) Vid. 2 *Bl.* Com. 458 ——(*b*) Per *Holt*, C. J. in *Bernard* v. *Bridgeman*, Hob. 12.——(*c* Consolato del mare, ch. 236.——(*d*) *Vinnius*, ad ff. de exercit. § 4, p. 844.

Even

Even in a foreign country, and in the abſence of the owners, the maſter cannot take up money on bottomry, for any debt of his own (*a*), but only for the uſe of the ſhip, in caſes of neceſſity; and this muſt appear in the written contract, otherwiſe the lender will neither have a *lien* on the ſhip, nor an action againſt the owners. The maſter in ſuch caſe would be alone liable, though it ſhould appear that the money was ſpent in ſupplying the neceſſities of the ſhip (*b*). Hence it would ſeem that originally the lender was bound to ſee to the application of the money advanced by him, and that he was obliged to prove this, to entitle himſelf to recover againſt the owners. But, as the law now ſtands, if it appear that the money has been fairly and regularly lent to ſupply the neceſſities of the ſhip, the miſapplication of it by the maſter will not affect the claim of the lender, who will have his action againſt the owners, and his *lien* on the ſhip, without proving that the money was properly applied. He has no reaſon to miſtruſt the maſter, whom the owners have employed. But if he be an accomplice in any fraudulent miſapplication of the money, the owners may impeach the contract upon that ground (*c*).

Even in a foreign country the maſter can only borrow money in caſe of neceſſity.

And this muſt appear in the contract.

But the lender is not bound to look to the due application of the money.

In a former part of this work (*d*), it was ſhewn that no *Britiſh* ſubject can legally trade with the enemies of the ſtate in time of war: and that therefore an inſurance upon ſuch trading is void. It was alſo ſhewn that the inſurance of the ſhips and effects of the enemy has, on ſeveral occaſions, been prohibited by ſtatute; and many arguments and authorities have been adduced to prove that, even at common law, ſuch inſurances are illegal. It is needleſs to repeat thoſe arguments here, every one of which applies with equal, if not greater, force, to prove that the lending of money to the enemy upon bottomry is illegal, if not highly criminal.

Whether money may be legally lent on bottomry to an enemy, in time of war.

(*a*) *Molloy*, b. 2, c. 2, § 4 Laws of *Oler*. art. 1, 22.—— (*b*) ff. de exercit. art. 7, *Vinnius*, ad id. *Emerig*. t. 2, p. 434. ——(*c*) *Loccen*. l. 2, c. 6. n. 12. *Emerig*. t. 2, p. 441.—— (*d*) Sup. 85.

CHAP. III.

Of the Thing hypothecated.

Money may be lent on whatever may be insured;

IT is a general rule that money may be lent on bottomry or respondentia, on whatever may be the subject matter of insurance. It may be lent on the body, tackle, furniture, and provisions of the ship, or upon all, or any part of the cargo; or upon both ship and cargo (*a*).

The borrower may take the money on board with him.

But money may be borrowed on respondentia without hypothecating any thing. The borrower may, and frequently does, take the money on board with him in specie, in order that he may employ it in trade in the course of the voyage; which, as has been already observed (*b*), was probably the original intention of such loans.

But the money, or its equivalent, must be exposed to the perils of the sea, at the risk of the lender.

But it is of the essence of this contract that the money lent, or something equivalent to it, be exposed to the perils of the sea, at the risk of the lender. And the same reasons of policy which forbid gaming insurances equally apply to wagers in the form of bottomry loans. If the borrower have no effects on board; or having some, he borrow much beyond their value, and agree to pay high marine interest, this will afford a strong ground to suspect fraud, and that the voyage will have an unfortunate end. *Cum capitaneus, ad cambium receperit longe majorem pecuniæ summam quam fuerit risicum super navi existens, præsumi debit sinistrum fuisse dolosum* (*c*).

This practice restrained by stat. 22 C. 2. c. 11.

Our legislature long since found it necessary to restrain the mischiefs resulting from this practice, and therefore by stat. 16 C. II. c. 6, re-enacted and made perpetual by the stat. 22 C. II. c. 11, § 12, after reciting that,

(*a*) *Pothier*, h. t. n. 9.——(*b*) Sup. 735, 6.——(*c*) *Casaregis*, dis. 62, n. 7; Vid. *Le Guidon*, ch. 19, art. 10.

"Whereas

" Whereas it often happeneth that masters and mariners " of ships having insured or taken upon bottomry, greater " sums of money than the value of their adventure, do " wilfully cast away, burn, or otherwise destroy the ship " under their charge, to the merchants and owners " great loss;" for the prevention thereof for the future, enacts, 'That if any captain, master, mariner, or other ' officer belonging to any ship, shall wilfully cast away, ' burn, or otherwise destroy the ship unto which he be- ' longeth, or procure the same to be done, he shall suffer ' death as a felon.'

Wagers, in the form of bottomry contracts, are permitted in some parts of *Italy*.

At *Leghorn* and some other parts of *Italy*, where gaming insurances are tolerated, wagers in the form of bottomry contracts are also allowed (*a*).—In *France*, it was the wise policy of the framers of the famous ordinance of 1681, to prohibit all gaming and wagering upon the events of maritime adventure; and therefore they did not only forbid all gaming insurances, but also all wagers in the form of bottomry contracts. It is therefore provided (*b*) that, in case of loss, the borrower upon goods shall not be discharged without proving that he had goods on board at the time of the loss, on his own account, to the amount of the sum lent.

They are prohibited in *France*.

The 19 *G*. II. c. 37, § 5, directs that, upon *East India* voyages the money shall only be lent on the ship or goods on board, with benefit of salvage to the lender.

In *England* it was not unusual, before the stat. 19 *G*. II. c. 37, for persons to borrow money *on the voyage*, as it was called; that is, where the borrower, having nothing, either in the ship or cargo, which he could hypothecate, took up money on his own personal credit, and on the credit of his sureties, if he had any. The money thus borrowed was often taken on board, and usually employed in some commercial adventure depending on the success of the voyage; and therefore this might generally be considered as a legitimate loan upon respondentia. But the spirit of gaming having availed itself of this form of contract to cover wagers, particularly in long

(*a*) *Casaregis*, disc. 14, 15.—— (*b*) Ord de la mar. h t. art. 3, 14; vid. *Emerig*. t. 2, p. 496, 500; *Valin*, on art. 3, 14, h. t.

voyages, the stat. 19 *G.* II. c. 37, after prohibiting insurances without interest, declares (§ 5.), 'That all 'money lent on bottomry or at respondentia, upon any 'ship or ships belonging to any of his Majesty's subjects, 'bound to or from the *East Indies*, shall be lent only on 'the ship, or upon the merchandizes on board, and shall 'be so expressed in the condition of the bond; and the 'benefit of salvage shall be allowed to the lender, who 'alone shall have a right to make insurance on the money 'so lent; and in case it shall appear that the value of his 'share in the ship, or the effects on board, does not 'amount to the full sum or sums he has borrowed as 'aforesaid, such borrower shall be responsible to the 'lender for so much of the money borrowed as he has 'not laid out on the ship or merchandize laden thereon, 'with lawful interest for the same, in the proportion the 'money laid out shall bear to the whole money lent, 'notwithstanding the ship or merchandize shall be totally 'lost.'

Whether a wager, in the form of a bottomry loan, be a legal contract at common law.

It is said (*a*) that, as *East India* voyages only are mentioned in this act, and that as *expressio unius est exclusio alterius*, it follows that bottomry loans, where the borrower has nothing on board, may be legally made in all other cases, as at common law, except in the cases prohibited by the stat. 7 *G.* I. c. 21, § 2. (*b*).

It is certainly not a little singular that the same legislature which thought it necessary to prohibit such loans upon *East India* voyages, should not have thought the same prohibition equally necessary in all other cases. I cannot, however, admit the application of the maxim, *expressio unius est exclusio alterius.* If, indeed, the maxim were, *exclusio unius est recognitio alterius*, it might be more applicable. But such a maxim would have the effect of proving, that a statute which should be made to restrain one particular abuse, would sanction all others of the same nature; which is manifestly absurd. But, be this as it

(*a*) *Park*, 411.——(*b*) Vid. inf. 754.

may,

may, ſuch an inference is not ſufficient to prove that a ſpecies of gaming ſo miſchievous in its tendency, had ever been ſanctioned by the common law. Nothing ſhort of a ſolemn deciſion of one of the ſupreme courts of *Weſtminſter*, could give to ſuch doctrine the ſtamp of authority; and I believe there has not yet been ſuch a deciſion.

The ſtat. 7 *G.* I. c. 21. prohibits the lending money on bottomry on foreign *Eaſt India* ſhips.

Many *Britiſh* ſubjects having, in the reign of *George* I., fitted out ſhips and clandeſtinely traded to the *Eaſt Indies* under colour of foreign commiſſions, the ſtat. 7 *G.* I. c 21, § 2, made to reſtrain theſe practices, and to protect the monopoly of the *Eaſt India* company, amongſt other regulations, declares, ‘ That all contracts and agreements, ‘ made or entered into by any of his majeſty's ſubjects, ‘ or any perſon or perſons in truſt for them, for the loan ‘ of any money by way of bottomry, on any ſhip or ſhips ‘ in the ſervice of foreigners, and bound to, or deſigned ‘ to trade in, the *Eaſt Indies*, ſhall be void.’

Whether this act reſtrains the lending of money to foreigners trading to their own ſettlements in India.

It is ſaid (*a*) that this act does not mean to prevent the king's ſubjects from lending money on bottomry on foreigns ſhips, trading to their own ſettlements in the *Eaſt Indies*; and it muſt be owned that, from the preamble to the act, it would ſeem that it had only in view to reſtrain the illegal commerce of *Britiſh* ſubjects with the *Eaſt Indies*, without any reference to that of foreigners; yet the above clauſe expreſsly, and in the moſt unqualified terms, reſtrains the lending of money on bottomry on *any* ſhip or ſhips *in the ſervice of foreigners* (*b*). Whether a ſhip, the property of *Britiſh* ſubjects, fitted out by them, and laden with their merchandize, can be ſaid to be *in the ſervice of foreigners*, merely becauſe ſhe is furniſhed with a commiſſion from a foreign ſtate, is a queſtion upon which there has not yet been any judicial deciſion.

Sumner v. Green, 1 H. Bl. 301.

It would ſeem that a reſpondentia bond for money lent by a *Britiſh* ſubject, upon goods on

In the year 1789 an action was brought in the court of Common Pleas on a reſpondentia bond, executed by the defendant, an *American*, to ſecure payment for a

(*a*) *Park*, 412.——(*b*) Vid. ſup. 128.

board an *American* ship, on a voyage from *Bengal* to *Rhode Island* is void.

cargo of goods shipped by the plaintiff, a *British* subject at *Calcutta*, on board an *American* ship, homeward bound, from *Calcutta* to *Rhode Island*. The ship had sailed from *England* and landed a cargo of *European* goods in *Bengal*, previously to her taking in the cargo, on which the bond was given.—The defendant, being arrested on the bond, moved to be discharged out of custody on entering a common appearance, on the ground that, since the independence of the *United States*, an *American* ship was a *foreign ship* within the meaning of the above stat. 7 *G.* I. c. 21, § 2.—The court discharged the defendant.—Lord *Loughborough* said,—"We do not think it necessary upon this application, to give any decided opinion upon this act; but it would be improper to hold the defendant in custody, if there appear a probable ground that the contract which is the foundation of the action is void. I do not chuse to enter into the construction of the statute; but I think it probable that, in its true meaning, it would reach all trading to the *East Indies* for the purpose of sending goods to other parts of the world, contrary to the provisions of the company's charter."

Money may be borrowed on freight.

By the law of *England*, freight, as we have already shewn (*a*), may be insured, and consequently it may be hypothecated upon a bottomry contract.

In *France* money cannot be borrowed on *freight*, or on *profit*.

In *France* the borrowing of money by the owners of a ship, on freight not earned, is prohibited (*b*). The reason, as *Valin* informs us (*c*), is, because the lender would be at the mercy of the borrower, who would not much concern himself about freight, from which he could derive no profit. But it is permitted to borrow money on freight, already earned; that is, where the money borrowed is to be employed by the *affreighter*, in paying freight which he is bound to pay at all events. Freight, in that case, being an expence which the affreighter must lose if the ship should be lost without completing her voyage, is a proper subject of insurance, and consequently of a bottomry loan (*d*). Nor is

(*a*) Sup. b. 1, c. 3, s. 6, p. 91.——(*b*) Ord. de la mar. h. t. art. 4.——(*c*) *Valin* on art. 4, h. t.——(*d*) Vid. sup. 91, 92.

it

it permitted by the *French* law to borrow money on bottomry on the profits expected upon goods, because profit is uncertain, and has no physical or substantial existence on board (*a*).

Seamen may borrow money on their goods on board; but not on their wages.

Seamen may undoubtedly borrow money on any goods they may have on board; because, as far as relates to such goods, they are in the same situation as those of any other shipper. As to their *wages*, the same reasons of policy, drawn from the necessity of interesting them in the preservation of the ship, which prohibit their being insured, equally forbid their borrowing money on them (*b*).

Whether money may be lent on a ship or goods already in risk.

Whether money may be lent on a ship or goods already exposed to the perils of the sea, is a question upon which some learned men have differed.—*Valin* (*c*) holds, that it makes no difference whether the loan be made before the ship's departure or afterwards; 'because,' says he, 'the presumption is, either that the money 'has been usefully employed in the things put in risk, 'or in paying what was due on that account.'—*Emerigon* (*d*), on the contrary, supposes that the original idea of bottomry was, that the money borrowed should be bestowed on the ship, or vested in goods for exportation (*e*); and that, upon this principle, this species of loan has been permitted and encouraged: But that, as soon as the ship sets sail the motive to this ceases; and a loan, after the ship's departure, could not be said to have purchased the goods already exposed to the perils of the sea.—This is plausible, but *Valin*'s reasoning seems the most satisfactory.

(*a*) *Ord. de la mar.* h. t. art. 4, *Pothier*, h. t. n. 14. *Emerig.* t. 2, p. 480. Vid. sup 94. Vid. *Bynk quæst. jur priv.* lib. 4, c. 5, in which he cites a decision of the senate of *Rotterdam*, to shew that *lucrum quod speratur, per leges nauticas assecurari non posse.*——(*b*) *Emerig.* t. 2, p 480.——(*c*) On art. 16, tit. *de la [illegible]ise*, tom. 1, p. 3[illegible]6.——(*d*) Tom. 1, p 484.——(*e*) *Trajectitia ea pecunia est quæ trans mare vehitur:—Sed videndum an merces ex eâ pecuniâ compăratæ, in eâ causâ habeantur, et inter [illegible], utrum etiam ipsæ, periculo creditoris, navigent: [illegible] enim trajectitia pecunia [illegible] ff. de naut. fœn.* 1

CHAP. IV.

Of the Principal, and marine Interest.

Of what the loan may consist.

TO constitute this contract, one party must lend the other a sum of money upon the usual conditions. Not that this contract could only be made upon a loan of *money*; for, as a loan, it may consist, according to the *Roman* law, of all those things *quæ pondere, numero, et mensurâ constant, et quæ usu consumuntur* (*a*). In practice, however, such loans are scarcely ever made but in money (*b*). *Emerigon*, indeed, mentions an instance of a loan of six dozen of *Morocco* skins, which were lent on *respondentia*, and a security given for the sum at which they were valued, with marine interest at *cent. per cent.* (*c*).

The principle upon which marine interest is allowable.

Bottomry, as has been already observed, differs from a simple loan in this, that, in the latter, the borrower takes the risk upon himself, and must repay the money at all events; whereas the lender on bottomry takes on himself the risk arising from the dangers of the sea, and is only to be repaid in the event of a safe arrival. He may therefore legally stipulate that, in the event of a safe arrival, he shall be paid, beside the sum lent, not only a compensation for the *use* of his money, but also the price of the risk. And as it is impossible to fix any rule by which this can be precisely ascertained, it must in all cases be settled by the agreement of the parties (*d*). *Trajectitia pecunia, propter periculum creditoris; quamdiu navigat navis infinitas usuras recipere potest* (*e*). *Justinian*, however, after prohibiting the *centesima* (which was one *per cent. per* month, or twelve

(*a*) ff. l. 2. *de reb. cred.* § 1.——(*b*) *Pothier*, h. t. n. 8.——(*c*) *Emerig.* t. 2, p. 412.——(*d*) Vid. *Pothier*, h. t. n. 2. (*e*) *Paul.* sent. 3, 11, 14.

per

per cent. per annum), in ordinary cafes, permitted it in this contract, and forbid any higher intereft (*a*).—Such a rule might have been proper in a country where navigation was confined to mere coafting voyages, and where the principal difference between the rifk of one voyage and of another confifted in the time in which each might be performed. But, in modern times, when commerce is carried on between countries the moft remote from each other, it would be impoffible to fix any precife ftandard by which the rate of marine intereft could be properly regulated.

Legality of it.

The marine intereft, therefore, however high or exorbitant it may feem, cannot be deemed ufury, provided the money lent be *bonâ fide* put in rifk. Several attempts, however, have been made to call in queftion the legality of fuch contracts; but, in every inftance, the courts, both of law and equity, have held that if the principal be *bonâ fide* put in rifk, the contract is legal, however high the marine intereft referved may be (*b*).—If, indeed, the form of a bottomry or refpondentia loan be ufed as a cloak to an ufurious contract, there can be no doubt, but that it would be illegal and void.

It is only due where the rifk has been commenced.

It is of the effence of this contract that the fum lent be put in rifk; and it does not, in truth, become a bottomry or refpondentia contract, till the rifk commences. Therefore, by the *Roman* law, if the borrower had fpent the money on fhore, and did not expofe it to the perils of the fea, it was not deemed bottomry, but only a fimple loan at common intereft (*c*). And, by the general law of merchants, at this day, the contract of bottomry, like that of infurance, is merely *executory*, till the rifk has been commenced; and the borrower, like the infured, may, at his pleafure, by giving up the voyage propofed,

If the rifk be not commenced, the contract will become a fimple loan; even though the borrower covenant to perform the voyage.

(*a*) *Cod. lib.* 4, tit. 32, *de ufur.* 26.— (*b*). R. *Sharpley* v. *Hurrell*, *Cro.* J. 2.8; Per *Dodderidge*, J. in *Roberts* v. *Tremayne*, *Cro.* J. 508; R. in *Joy* v. *Kent*, *Hard.* 418; R. in *Soome* v. *Gleen*, 1 *Sid.* 27, 1 *Lev.* 54; Vid. *Dandy* v. *Turner*, 1 Eq. Ca. Ab. 372; R. *De Guilder* v. *Depeifter*, 1 *Vern.* 236; R. Anon. 2 Ch. Ca. 30.—(*c*) *ff. de naut. fen.* 1.

or by not shipping the goods on which the money was lent, prevent its ever taking effect. For, however it may have happened, that the risk was never commenced, it is sufficient that it has happened, to turn the contract into a simple loan, at common interest. The marine interest can only be due in respect of the principal having been actually put in risk; nothing else can give the lender a legal claim to it. And this is so, even where the borrower covenants to perform the voyage mentioned in the contract within a limited time (*a*).

De Gelder v. De Tesier, 1 Vern. 263.

Therefore, where the borrower was bound, in consideration of 400 l. the sum lent, to perform the voyage mentioned in the bond, within six months; and also, at the expiration of that time, to pay the 400 l. and 40 l. premium, in case the vessel arrived safe; and it happened that the ship never sailed on the voyage, whereby the bond became forfeited.—The borrower brought his bill in equity to be relieved; and it was there decreed, that, as there had been no hazard of losing the principal, the lender must give up the premium, and be content with his principal and *ordinary interest.*

What allowance ought to be made to the lender, where the risk has not been commenced.

To the simple interest payable, in such cases, on the sum borrowed, *Valin* (*b*), by analogy to the practice in cases of insurance, holds that one half *per cent.* upon the marine interest, ought to be paid by the borrower who has failed in the contract, in case the lender has insured his principal.—*Emerigon* (*c*) approves of this; but adds, that if the borrower be not in fault, it will be sufficient to repay the sum lent, with the ordinary interest. To me it seems but reasonable that the lender should, in every such case, receive not only his principal and interest, but also one half *per cent.* upon the marine interest, and all charges of insurance.

When the risk ceases, the marine interest ceases.

In general, as soon as the risk ceases, (*discusso periculo*) either by the ship's safe arrival, the expiration of the

(*a*) *Pothier*, h. t. n. 38, 39; *Valin* on art. 15, h. t.; *Emerig.* t. 2, n. 494.——(*b*) On art. 15, h. t.——(*c*) Tom. 2, p. 496.

 term,

term, or any other event, the marine intereft ceafes, and the debt becomes abfolute. From that time, if the borrower delay payment, it bears only ordinary intereft (*a*).

When the time of the rifk is limited, the rifk and the marine intereft will end with the time, though the voyage be not ended.

If the contract be for a certain number of months, either at a fpecific fum, or at fo much *per* month, and fo at that rate, for any longer time, not exceeding a fixed period; and the voyage be performed within the period firft limited, the marine intereft for the whole of that period, will neverthelefs be due: But if it exceed the latter period, the rifk of the lender will ceafe, and the debt become abfolute, though the voyage fhould not be ended. *Poft diem præftitutam, et conditionem impletam, periculum effe creditoris definet* (*b*).

Ingledew v. *Fofter*, 4 *Vin.* Ab. 281.

And the rifk of the lender will ceafe, though the fhip was prevented by accident from performing her voyage within the time limited.

And this holds, even where the fhip has been prevented by inevitable accident from performing her voyage within the time limited.—As where money was lent on bottomry, with a condition that if the fhip, which was bound to the *Eaft Indies*, fhould return to *London* within 36 months, or if fhe fhould not return within that time, and fhould not be taken or loft within that time, the money to be paid, &c. *The fhip was detained at* Surat *in* India, *by an embargo laid by the* Mogul, *till after the* 36 *months were elapfed, and in her return home was taken*; fo that the bond was forfeited. But there being no fault in the mafter, and the voyage being thus delayed by inevitable accident, the borrower brought his bill to be relieved againft the penalty of the bond.—But Lord *Harcourt*, Ch. faid,—" I cannot relieve in this cafe, againft the exprefs agreement of the parties.—If the lender has infured this money upon the fhip, the borrower fhall have the benefit of the infurance, upon allowing the lender the charges of the infurance, and paying him the money in three months."

If the marine intereft be agreed to be paid for the firft fix months, though the fhip fhould be loft; whether this be a legal contract.

Emerigon puts a cafe, where it is ftipulated that 12 *per cent.* fhall be paid for the firft fix months; and that this fhall be payable, *though the fhip fhould be afterwards loft*. And he feems to be of opinion that, if the fhip be loft

(*a*) *ff. de naut. fœn.* 4.—(*b*) *ff. ut fup.*

after

after the six months, the lender is not entitled to the six months' interest[*]—He says, that if the borrower had remitted the interest for the first six months, the lender might fairly receive it; but that, if he should not, from the profits of his trade, have been enabled to do this, he would be discharged from all obligation (*a*).—This distinction is founded on principles much too vague and indefinite to be received as law. With us, the contract would not be usurious, because the sum lent would be put in hazard; and being legal, it would be binding upon the borrower, whatever might be the ultimate success of the adventure. In such a case, the first six months would be considered as a distinct risk.

Common interest begins to run on the principal, as soon as the risk ends.

If, when the sea-risk is ended, the borrower delay payment, the common interest begins to run, *ipso jure*, without any demand. *Discusso periculo majus legitimâ usurâ non debebitur* (*b*). But this interest runs only on the principal, not on the marine interest; for this would be interest upon interest: *Accessio accessionis non est* (*c*).

(*a*) *Emerig.* t. 2, p. 518.——(*b*) *ff. de naut. fan.* 4.——(*c*) *Pothier*, h. t. n. 51.; *Emerig.* t 2, p. 414.

CHAP. V.

Of the Perils or Risks to which the Lender is liable.

IT is essential to this contract, not only that the money be lent on a ship or goods, but likewise that these be exposed to the perils of the sea, at the risk of the lender; that is, that the repayment of the sum lent, and the marine interest, shall depend on the safe arrival of the ship or goods (*a*). The perils of the sea, in a large sense, comprehend all those accidents and misfortunes, to which ships at sea are exposed, and which no human foresight or precaution can avert or resist; *Vis divina, quæ præcaveri, & cui resisti, non potest.* This idea seems to be very fully expressed in the usual terms of our bottomry and respondentia contracts; by which it is provided that, '*if, in the course of the voyage, and within the time prescribed, an utter loss of the ship, by fire, enemies, men of war, or any other casualties, shall unavoidably happen,*' the bond shall be void, and the borrower discharged. So that the perils to which the lender is exposed, are nearly the same as those to which the underwriters upon a policy of insurance are liable (*b*).

It is essential to this contract that the lender run the sea-risk;

The perils are nearly the same as in insurance.

Though a loss by pirates is not usually expressed in bottomry or respondentia securities; yet this is a risk within the meaning of the words; piracy being one of the *casualties* to which ships at sea are liable (*c*).

A loss by pirates is within the contract.

(*a*) *Pothier*, h. t. n. 16, 38.——(*b*) Vid. *Le Guidon*, ch. 18, art. 2. *Valin* on art. 11, h. t. and on art. 6, tit. *des assurances*; *Pothier*, h. t. n. 16. Vid. sup. 487.——(*c*) R. in *Barton* v. *Wolliford*, *Comb.* 56. But this was not a question upon a bottomry contract, as has been supposed. *Park* 421. It arose in an action on a bill of lading, to which the defendant pleaded piracy; and upon demurrer to this plea, it was contended, that robbery is no more an excuse to a master of a ship than to a common carrier: But the court held that piracy was an excuse in this case, being one of the dangers of the seas.

Nothing ſhort of a total loſs will diſcharge the borrower.

But whatever may be the perils to which the lender is liable,—nothing ſhort of a total loſs will diſcharge the borrower. The obligation remains, however the goods may be damaged by the perils of the ſea. Nor is there any deduction on account of ſuch damage; for the lender is not bound to contribute to ſimple average or particular damage, unleſs by expreſs agreement. In this reſpect, the lender on bottomry is in a better ſituation than an inſurer, who is obliged to indemnify the inſured, to the extent of the ſum inſured, from all damage ariſing from any of the perils inſured againſt.' A capture, therefore, to have the effect of diſcharging the borrower, muſt be ſuch a taking and detention as would amount to a total loſs in a caſe of inſurance: A mere temporary detention will not diſcharge the borrower, unleſs the voyage be thereby loſt.

Joyce v. Williamſon, B. R. Mich. 23 G. III. MS.

A ſhip is captured and detained for a month, recaptured and carried to a port out of the courſe of the voyage, reſtored on payment of ſalvage, and at laſt arrives at her port of deſtination: The borrower is not diſcharged.

Thus:—An action was brought on a bottomry bond, on a voyage from the *Tagus* to *New York*; and the condition of the bond was, that if, upon the ſhip's arrival at *New York*, the defendant ſhould pay the plaintiff the ſum lent, with the ſtipulated intereſt; or if the ſhip ſhould be loſt, taken by the enemy, miſcarry, or be caſt away, the bond to be void, otherwiſe to remain in force.—The defendant pleaded, 1ſt, *Non eſt factum*; 2dly, that the ſhip did not arrive ſafe at *New York*; 3dly, that the ſhip was captured by the enemy.—Iſſue was joined upon the two firſt pleas; and to the third the plaintiff replied recapture. Iſſue being joined on this replication, it appeared upon the trial, that the ſhip was taken on her paſſage to *New York*, detained for a month, and plundered of her ſtores; that ſhe was then retaken by an *Engliſh* privateer, and carried into *Halifax*; where the court of admiralty decreed that ſhe ſhould be reſtored to the original owners, on payment of ſalvage, which was raiſed by ſale of part of the cargo; that after a conſiderable repair there, ſhe ſailed for *New York*, where ſhe arrived with the remainder of her cargo, and earned her freight: That the ſhip and freight were then worth the ſum mentioned in the bond; but not worth that

4 ſum,

ſum, and the ſum laid out in repairs.—There was a verdict for the plaintiff, and the court, upon a motion for a new trial, determined that the verdict was right, and the plaintiff entitled to recover.—Lord *Mansfield*, in delivering the opinion of the court, ſaid;—" It is clear that, by the law of *England*, upon a bottomry contract, there is *neither average nor ſalvage.* It has been contended on the part of the defendant, that this caſe is within the ſaving words, that in caſe of loſs by *capture*, the bond ſhould be void; and that here was a capture and detention for a month. But, upon conſideration, we are all of opinion, that a taking, within this condition, does not mean a temporary taking, which is only an obſtruction which may laſt for a day, it muſt be ſuch a taking as, between inſurer and inſured, would amount to a *total loſs*. But this was not ſuch a capture. The voyage was not loſt; for the ſhip arrived at her port of deſtination and earned her freight: And, as freight depends on the ſafety of the ſhip, ſhe muſt have *arrived ſafe* to have earned her freight. Either way there muſt be a hardſhip; but the law allows no average or ſalvage in bottomry bonds."

The lender is not liable for loſs proceeding from the internal defect of the thing, unleſs by expreſs ſtipulation.

No loſs will have the effect of avoiding the contract, or diſcharging the borrower, but a total loſs proceeding from the perils of the ſea, during the voyage, and within the time ſpecified in the contract. *Creditor ſubit periculum navigationis in caſibus fortuitis tantum* (a). But no loſs ſhall be reputed to have ariſen from the perils of the ſea, which aroſe from the internal defect of the thing hypothecated. As where a ſhip is not ſea-worthy, and periſhes from age, rottenneſs, or other ſuch cauſe; or where goods periſh of themſelves, liquors run out through the defect of the caſks; dry goods heat and ferment by length of time (b), &c. *Valin* (c) ſeems to condemn,

(a) *Roccus* de navib. n. 51 —(b) *Ord de la mar.* h. t. art. 12 *Emerig.* t. 2, p. 509. *Pothier*, h. t. n. 34.——(c) On art. 12, h. t.

as illegal, any clause by which the lender is made liable for loss occasioned by the internal defect of the thing: But *Emerigon* (*a*) holds, that the lender may, by express stipulation, make himself liable for such losses, provided the cause did not exist before the ship's departure.

He is not liable for the act of the owners or master of the ship.

The act of the owners of the ship, of the master, or of the borrower, is not a peril at the risk of the lender. *Quia suscipit in se periculum navigationis, suscipit periculum fortunæ, non culpæ* (*b*). As if the voyage be changed by order of the owners of the ship; or if a loss happen by the barratry of the master, or by the misconduct of the merchant; this will not discharge the borrower. *Si infortunium vel naufragium, ex culpa debitoris processerit, tunc creditor non tenetur de periculo et damno in quod incurritur, ex culpa vehentis aut alterius* (*c*). This is the general rule; but, by express stipulation, the lender may be made liable for every loss not occasioned by the act of the borower (*d*).

Nor for a loss by smuggling, unless he was privy to it.

If the ship be forfeited, or the goods confiscated, for smuggling, in which the lender had no concern, he is not liable for the loss; for this does not arise from the perils of the sea, but from the impatient avarice and lawless temerity of the borrower. *Non ex marinæ tempestatis discrimine, sed ex præcipiti avaritiâ, et incivili debitoris audaciâ* (*e*).—Yet it is said, that if the lender were privy, and consenting to the contraband trade in which the money was to be employed, he shall be liable for the loss. *Si sciente, et consentiente illo fiat, consensus jus facit* (*f*).—In *England* if the money were lent to be employed in a trade prohibited by law; the contract would be absolutely void; and the sum lent could never be recovered from the borrower, even though no loss had happened (*g*).

If the ship do not sail on the

The lender, like an insurer, is only answerable for

(*a*) Tom. 2, p. 509.——(*b*) *ff. de naut. fæn.*——(*c*) *Roccus de navib.* n. 51.——(*d*) Vid. *Emerig.* t. 2, p. 510.——(*e*) *ff. de naut. fæn.* 3.——(*f*) *Kuricke,* tit. 6, p. 762. Vid. *Valin* on art. 12, h. t.—— (*g*) Vid. sup. book 1, ch. 3, § 1, 2.

losses

losses which happen within the time and place of the risk, as specified in the contract. Therefore, if the ship, without necessity, deviate from the voyage described in the bond, the lender will not be liable, any more than an insurer, to any loss that may afterwards happen (*a*). Upon this point I would refer the reader to the subject of deviation, in cases of insurance (*b*), the doctrine of which is equally applicable to the present subject.

voyage described, or deviate without necessity, the lender will be discharged from the risk.

Our courts, both of law and equity, have adopted the same principle in several instances.

W[illegible] v. Wildy, Skin. 152.

A ship is lost after a wilful deviation, the lender is not liable.

Thus:—The plaintiff lent 500 l. upon the hull of a ship, and the defendant covenanted to pay, if the ship went from *London* to *Bantam*, and returned from thence directly to *London*, within 12 months, 550 l.; if from *London* to *Bantam*, and from thence to *China* or *Formosa*, and returned to *London* within 24 months, 650 l.; and if she returned not within 24 months, then to pay 5 l. *per* month above the 650 l., till 36 months; and if she returned not within 36 months, then to pay 710 l. unless it could be proved that the ship was lost within the 36 months.—The ship went from *London* to *Bantam*, and from thence to *Surat* and other parts, and so returned to *Bantam*; and in her voyage from *Bantam* to *London*, was lost within 36 months.—In an action upon the bond; after a series of long and intricate pleadings, the above facts appeared upon demurrer.—The court inclined to think, that, by reason of the deviation in going to *Surat*, the plaintiff was discharged from the risk, and therefore entitled to recover; and after time taken to deliberate, they adjudged accordingly (*c*).

Williams v. Stedman, Skin. 345; *Holt's* Rep. 126. S. C.

If the ship be pressed into the King's service, this will excuse a deviation; but if the borrower allege a deviation, this must be explicitly denied.

So, where, to an action upon a bottomry bond, the defendant pleaded, that the ship went from *London* to *Barbadoes*, *sine deviatione*, and afterwards, on her return from *Barbadoes* towards *London*, she was lost *in viagio*

(*a*) *Pothier*, h. t. n. 18. *Emerig.* t. 2. p. 522.——(*b*) Sup. 183.——(*c*) Vid. Anon. 1 Eq. Ca. Abr. 372. 2 Ch. Ca. 130.

 predicto.

prædicto. The plaintiff replied, that the ſhip, in her return, went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe ſailed from *Jamaica* for *London*, and was loſt; and ſo ſhews a deviation: The defendant rejoined, that ſhe was preſſed into the King's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; *abſque hoc*, that ſhe deviated after ſhe was preſſed. Upon demurrer to this rejoinder, the plaintiff had judgment.—The court held that the plea of the defendant was not good; for he alleged that the ſhip went from *London* to *Barbadoes*, without deviation, and that, in her return from *Barbadoes* to *London*, ſhe was loſt *in the voyage aforeſaid*; but did not ſhew, *without deviation*. And as the condition was ſo in expreſs words, the defendant ought to have ſhewn expreſsly that he had performed it according to the words.

Changing the ſhip without neceſſity, diſcharges the lender.

So where money is lent on goods, on board a certain ſhip, the lender is only conſidered as liable for the riſk on thoſe goods while they are on board that ſhip; and if they be removed to another ſhip, without neceſſity, the lender will be diſcharged (*a*).—But if the change be occaſioned by any neceſſity, he will ſtill continue liable. As if the firſt ſhip be preſſed into the king's ſervice, or be declared unnavigable, &c.; the borrower may load the goods on board another veſſel at the riſk of the lender, and the increaſe of freight, &c. will be a general average, to which the lender will be liable (*b*).

Duration of the riſk.

Money is generally lent for the whole voyage outward and homeward; or for either ſeparately; or for a limited time. The contract uſually ſpecifies the commencement and end of the riſk; and any misfortune happening before or after, is at the riſk of the borrower (*c*). If the voyage be deſcribed in the bond; but

(*a*) *Pothier*, h. t. n. 18; *Emerig.* t. 2, p. 524——(*b*) *Emerig.* ut ſup. Vid. ſup. book 1. ch. 5, § 2.——(*c*) Vid. *Valin*, on art. 13, h. t. *Emerig.* t. 2, p. 514.

the time of the commencement and end of the riſk be not ſpecified, the riſk, as to the ſhip, ſhall commence from the time ſhe ſets ſail, and continue till ſhe anchors in ſafety at her port of deſtination; and, as to goods, from the time they are ſhipped, till they are ſafely landed (a).

When the loan upon goods is both for the outward and homeward voyages, the lender continues liable to the riſk during the homeward voyage on the goods, by which thoſe have been replaced on which the money was lent (b).

(a) Vid. ſup. book 1, ch. 7, § 5.—(b) *Pothier*, h. t. n. 34.

CHAP. VI.

Whether the Lender be liable to general Average.

By the general law of merchants, the lender is liable to general average.

THERE is this difference between insurance and bottomry, that an insurer, unless he stipulate to be free of particular average, is always liable to that charge; whereas a lender is not liable to it, unless by express stipulation: But, by the general law of merchants, in case of *gross* or *general* average, the lender shall contribute to discharge the borrower (*a*): The reason of this difference is, that particular average in no degree contributes to the safety of the ship; whereas it is to those sacrifices which are the subject of general average, that the lender owes the preservation of his money, which, without such sacrifices, would be lost with the ship (*b*).

The nature of the contract seems to require this.

Foreign writers even hold that a stipulation on the part of the lender, to be free of general average, would be absolutely void, as being inconsistent with the nature of the contract, contrary to good policy, and injurious to the interests of the lender himself, who must lose all, if the ship be lost (*c*). Indeed the nature and object of bottomry contracts, seem, of themselves, to require that

(*a*) '*L'argent à profit n'est contribuable en aucune avarie, 'reservé qu' aux rachapts, compositions, et jets faits pour la sal- 'vation du total, et pour le soulagement ou l'évasion, des dangers.*' *Le Guidon*, ch 19, art. 5.—'*Ce qui est fort juste,*' says *Cleirac*, in his commentary on this passage, '*afin que cette grosse usure 'passe au paroisse*, Pensatio vel æquamentum periculi, *comme dit* Du Moulin, *sur la loi*, periculi pretium. Dig. de nautico fæ- 'nore, *en son traité*, Contract. usur. *quæst*. 3. de trajectitiis. *L'ar- 'gent a profit ne charge pas le navire mais l'affecte par hypothèque, 'laquelle ne subsiste que par la salvation d'iceluy; c'est pour quoy il est 'raisonnable que la dite hypothèque contribuè à ce qui concerne la con- 'servation du total, ou de son sujet*, Ut omnium in tributione sar- 'ciatur quod pro omnibus datum est.' Vid. *Pothier*, h. t. n. 42, 47.——(*b*) *Emerig*. t. 2, p. 505.——(*c*) Consult on this point *Valin*, on art. 16, h. t.; *Pothier*, n. 46; *Emerig*. t. 2, p. 505.

 the

the lender ſhall be liable for general average. The borrower generally takes up the money becauſe he has not a capital of his own upon which he can carry on his trade. Knowing that it would be impoſſible for him to repay the ſum borrowed, but in the event of a fortunate return, he means to run no riſk, and agrees to part with a large ſhare of his profits, to be free from all perſonal reſponſibility. But if he ſhould be held liable to general average, then, by taking up money in this way, he muſt engage in a game of hazard, perhaps without being aware of his danger, in which he may eventually be ruined.

Whether by the law of *England*.

It has been ſaid, however, by a very diſtinguiſhed judge, that, "*by the law of* England, *there is neither average nor ſalvage upon bottomry contracts* (*a*)" And this doctrine, ſo far as it relates to average, has been ſince adopted by another noble perſon, no leſs eminent for his learning and abilities (*b*). I have anxiouſly ſought, however, but ſought in vain, to find any decided caſe, or authority in the law, which could warrant this doctrine.—I cannot agree with a learned writer (*c*) on this ſubject, that the ſtat. 19 *G.* II. c. 37, § 5 (*d*), which provides that the benefit of ſalvage ſhall be allowed to the lender, on *Eaſt India* voyages concluſively proves that there was neither average nor ſalvage upon bottomry contracts at common law.—I never could look upon that act as having introduced any new principle into the law either of inſurance or bottomry contracts. On the contrary, it ſeems to me, after the beſt conſideration I have been able to give the ſubject, that it merely reſtored them to their original and only proper uſe, from which a ſpirit of gaming had been ſuffered to pervert them. I cannot even admit that, becauſe the ſtatute gives the benefit of ſalvage to the lender upon *Eaſt India* voyages, therefore he was not entitled to this at common law. As well might it be ſaid, that becauſe the inſurance of enemy's property, in time of war,

(*a*) Per Lord *Mansfield*, in *Joyce* v. *Williamſon*, ſup. 754.——
(*b*) Per Lord *Kenyon* at N. P. in *Walpole* v. *Ewer*, inf. 762.——
(*c*) *Park*, 423.——(*d*) Sup. 128.

has

has been occasionally prohibited by statute, therefore the insurance of enemy's property is a legal contract at common law (*a*).—But even admitting the inference, that because the statute gives the *benefit of salvage* to the lender upon *East India* voyages, therefore he was not entitled to this at common law; does it from thence follow that he was not liable to *general average* at common law? The statute no where mentions general average.

If the insured upon a respondentia interest on a foreign ship be obliged to contribute to a general average, the underwriters will be liable.

But whatever may be the true rule of law which ought to prevail on this subject, it has been determined, that if an insurance be made in *England* upon a respondentia interest upon a *foreign ship*, and it appear that the lender is liable by the law of the country to which the ship belongs, to contribute to a general average; the underwriters upon the policy will be liable for such contribution.

Walpole v. *Ewer*, at N. P. after Tr. 1789.

Thus:—Where a respondentia loan on a *Danish* ship and goods was insured in *England*, and an average loss was sustained upon the goods to the amount of 6 l. 15 s. *per cent.* to which the holder of the respondentia bond was obliged to contribute. He brought his action against the *English* underwriters to recover the amount of this contribution.—Lord *Kenyon*, who tried the cause, said,—"By the law of *England*, a lender upon *respondentia* is not liable to average losses; but is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination. The plaintiff contends that as, by the law of *Denmark*, such lenders are bound to contribute to average losses, according to the amount of their interest, the insurer here must answer to them. The *Danish* consul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: But I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the

The decision of a foreign court of competent jurisdiction is the best evidence to shew what the law of the country is.

(*a*) See this subject fully considered, sup. book 1, ch. 2, § 1.

opinions

opinions of advocates, however eminent, or even the extrajudicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country, to which the contract relates."—The jury found a verdict for the plaintiff (*a*).

(*a*) Vid. the case of *Newman* v. *Cazalet*, *Beawes* lex merc. 349, where an insured had been obliged by the judgment of a foreign court to pay a larger average contribution than by the law of *England* could have been demanded, but it appeared to have been customary in adjusting losses to allow the whole of such contributions; Mr. Justice *Buller* at N. P. ruled that if the usage were clearly proved, it ought to govern.

CHAP. VII.

Whether the Lender be entitled to the Benefit of Salvage.

The ftat. 19 *G.* 2. c. 37, gives the benefit of falvage to lenders on *East India* voyages.

THE provifion of the ftat. 19 *G.* II. c. 37, which gives the benefit of falvage to lenders on bottomry and refpondentia, being confined to *Eaft India* voyages, it may be proper here to enquire, whether, before that act, the lender, upon any voyage, was entitled to the benefit of falvage.

Whether the lender on other voyages be entitled to the fame benefit.

By the general law of merchants, the event upon which the borrower is difcharged, is the total lofs of the fhip or goods upon which the money is lent; provided this happen by the perils mentioned in the contract. Though the borrower is bound to pay the fum lent and the marine intereft, in cafe the fhip or goods on which the money is lent arrive at the port of deftination, however damaged or reduced in value by the perils of the fea; yet if part fhould be captured or loft, the borrower is only bound to pay in proportion to what remains (*a*).—Thus, if 1000 l. be lent on goods, the half of which are loft, the reft faved, the lender will lofe 500 l. of his principal, and the borrower will pay the remaining 500 l. with the marine intereft upon that fum. If the fhip be loft, but the goods, on which the money was lent are all faved, the contract will remain in force, and the borrower will be liable, provided another fhip can be procured to convey the goods to the place of their deftination. But the charge of the other veffel will be at the expence of the lender, and if no other can be procured, the borrower will be difcharged on accounting to the lender for the proceeds of the goods faved.

(*a*) *Pothier*, h. t. n. 47.; *Valin*, art. 11, 14, 17, h. t. *Emerig*. t. 2, p. 453. Confult on this point *Bynk. quaeft. jur. priv. lib.* 3, c. 16.

But,

But, by the law of *England*, according to the opinions of Lord *Mansfield* and Lord *Kenyon*, which we have already had occasion to refer to (*a*), *there is neither average nor salvage upon bottomry contracts:* It must be admitted, however, that, without the benefit of salvage, this contract must partake greatly of the nature of a wager, even when the money is lent upon goods on board of equal value. If there be a total loss of the ship the lender loses all, though all the goods are saved.

Lord *Mansfield's* opinion against it.

(*a*) Sup. 761.

As to the insurance of bottomry and respondentia loans, vid. sup. 117, 317.

As to the remedy of the lender, where the borrower becomes bankrupt, before the risk is ended, and the lender entitled to repayment, vid. sup. 731.

END OF THE SECOND BOOK.

BOOK THE THIRD.

Of Insurance upon Lives.

The subject of this book may be distributed under the following heads;

I. *Of the Nature of this Contract.*
II. *Of the Warranty of the Age and Health of the Life insured.*
III. *Of the Interest of the insured.*
IV. *Of the Risks.*

CHAP. I.

Of the Nature of this Contract.

Defined.

THE insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum, or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or an annuity equivalent, upon the death of the person whose life is insured, *whenever this shall happen*, if the insurance be for the whole life, or, *in case this shall happen within a certain period*, if the insurance be for a limited time.

Utility of it.

The precarious dependence of a numerous family upon the life of a single person, naturally suggests the idea of seeking some protection against a calamity, which sooner or later must befal them; and this, probably, suggested the first idea of insurances upon lives, as an expedient by which a pecuniary indemnity, at least, might be secured to the sufferers sufficient to rescue them from the poverty and distress which otherwise awaited them.

Upon this principle rests the utility of insurances upon lives. Persons having incomes determinable upon their own lives, or the lives of others, arising from landed property, from professions, from church livings, from public

public employments, penſions, annuities, &c. by paying ſuch an annual premium as they can ſpare from their preſent neceſſities, may ſecure to their widows, their children, or other dependants, an adequate ſum of money, or an equivalent annuity, payable upon their deaths. By ſuch inſurances, alſo, may the fines to be paid upon the renewal of leaſes, or upon the deſcent of copyholds, be provided for. So, where a perſon, having only a life income, wants to borrow money, but can only give his own perſonal ſecurity for it; he may, by inſuring his life, ſecure to the lender the repayment of his money, though he ſhould die before he is enabled to diſcharge the debt (*a*).

These conſiderations induced the biſhop of *Oxford* and ſeveral other benevolent perſons in the reign of Queen *Ann*, to apply for the charter by which the corporation, called the *Amicable Society*, was eſtabliſhed; to enable perſons to ſubſcribe a part of their incomes, in order that the repreſentative of each ſubſcriber ſhould, upon his death, receive ſuch a ſum as the funds of the corporation would enable them to pay, upon the ſeveral deaths happening in each year. Eſtabliſhment of the different companies for the inſurance of lives. *Amicable Society.*

But as the benefits of this ſociety were confined to a limited number of ſubſcribers, and thoſe only for ſmall ſums, ſeveral other corporations and companies upon more extenſive plans have been eſtabliſhed.—The *Royal Exchange* and *London Aſſurance* companies obtained charters from king *George* I. to enable them to make inſurances upon lives. The Society for *Equitable Aſſurances* on lives and ſurvivorſhips, was eſtabliſhed in the year 1762, by deed inrolled in the court of King's Bench at *Weſtminſter*, in which every perſon who inſures becomes a member, participating in the profit and loſs of the ſociety. The ſucceſs attending this eſtabliſhment has given riſe to many other inſtitutions of the ſame nature, in the country as well as in the metropolis; but all greatly inferior to the *Royal Exchange and London Aſſurance companies.* *Equitable Aſſurance.*

(*a*) Vid. inf. ch. 3.

the *Equitable Assurance*, in the extent of their dealings, and the magnitude of their funds.

Legality of insurance on lives.

We are not informed at what time this species of insurance was first introduced into this country; probably because it came into use by slow and imperceptible degrees. *Roccus* (*a*) has taken some pains to prove that insurances upon lives are legal contracts. Yet in most of the states of *Europe* such insurances have been prohibited by positive law. In this country, however, such contracts have been repeatedly sanctioned by legislative authority, and indeed the legality of them is now indisputable. Perhaps it might savour too much of national partiality to assert that in this country alone can insurances upon lives be safely tolerated. In *France*, they have always been deemed illegal (*b*), and they are expressly prohibited by the ordinance of 1681 (*c*), because, say the *French* writers, it is an offence against public decency to set a price upon the life of a man, particularly the life of a freeman, which is above all valuation (*d*); thus glossing over, with a fine sentiment, a motive of policy which could not be mentioned without conveying an insinuation to the discredit of the national character.

(*a*) *De assecur.* n. 74.——(*b*) *Le Guidon*, ch. 16, art. 5.——(*c*) Tit. *des assurances*, art. 10.——(*d*) *Valin*, on art. 10. tit. *des assurances*. Vid. sup. 215; *Pothier*, tit. *des assurances*, n. 127.

CHAP. II.

Of the Warranty of the Age and Health of the Life insured.

IT is generally a condition, or warranty, in an insurance upon a life, either inserted in the policy, or contained in a declaration or agreement signed by the insured, that the person whose life is meant to be insured has not any disorder which tends to the shortening of life; that he has, or has not, had the small pox; and that his age does not exceed a certain period; that this declaration shall be the basis of the contract between the insurers and the insured; and that if any untrue averment be contained therein, the contract shall be void, and all money paid on account of the insurance forfeited. The declaration signed by the insured.

As this declaration is to be taken as part of the written contract (*a*), amounting to a warranty, it behoves every person who makes an insurance upon a life, to be very circumspect in ascertaining the truth of the allegations contained in it; because upon that the validity of the contract must depend.

By the warranty that the person, whose life is to be insured, '*has no disorder which tends to the shortening of life,*' is not to be understood that he is perfectly free from the seeds of all disorder. The warranty is sufficiently true if he be in a reasonably good state of health, and, that his life may be insured on the common terms, for a person of his age and condition: And the following case will shew, that though he labours under a particular infirmity, yet, if it can be shewn that this had no A warranty that the party is in good health will not be falsified by proving that he laboured under a particular infirmity; if this had no tendency to shorten life.

(*a*) See the case of *Routledge* v. *Burrell*, inf. book 4, c. 4.

tendency to shorten life, and that, in fact, it did not, in any degree, contribute to his death, the warranty is sufficiently true.

Ross v. Bradshaw, 1 Bl. 312.

The life insured is warranted in good health at the time of making the policy:—It will not falsify this warranty, that, in consequence of a wound, he had a partial palsy in his loins; if this did not tend to shorten life.

Thus:—An insurance was made on the life of Sir *James Ross* for one year from *October* 1759 to *October* 1760; *warranted in good health at the time of making the policy.*—In an action on this policy, it appeared upon the trial, that Sir *James* had received a wound at the battle of *La Feldt*, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *faeces*, and which was not mentioned to the insurer. Sir *James* died of a *malignant fever* within the time of the insurance. All the physicians and surgeons who were examined for the plaintiff, swore that the wound had no sort of connexion with the fever; and that the want of retention was not a disorder which shortened life; but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. One physician, who was examined for the defendant said, that the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life: But, on the whole, he did not look upon him as a good life.—Lord *Mansfield*, who tried the cause, in summing up the evidence to the jury, said;—"No question of fraud can exist in this case. When a man makes an insurance upon a life generally, without any warranty of the state of the life insured, the insurers take all the risk, unless some fraud be committed by the person insuring, either by *suppressing some circumstances, which he knew*, or by *alleging what was false.* But if the insured knew no more than the insurer, the latter takes the risk. Wherever there is a warranty, it must, at all events, be proved that the party was a [illegible] which makes the question on a warranty [illegible] than on fraud. Here there was a war[illegible]t is proved that there was no representation [illegible] the state of the life, nor any question asked about

about it: Nor was it neceſſary. Where an inſurance is upon a *repreſentation*, every material circumſtance ſhould be mentioned; ſuch as age, way of life, &c. But where there is a warranty, then, nothing need be told; but it muſt, in general, be proved, if litigated, *that the life was, in fact, a good one: And ſo it may be, though he had a particular infirmity.* The only queſtion is, whether he was in *a reaſonaby good ſtate of health, and* '*ſuch a life as ought to be inſured on common terms.*"—The jury, upon this' direction, without going out of court, found a verdict for the plaintiff.

Willis v. Poole, at N. P. after Eaſt 1780.

Nor will it falſify this warranty to ſhew that the party was troubled with ſpaſms and cramps, from violent fits of the gout.

So, where an inſurance was made on the life of Sir *Simeon Stuart*, from the 1ſt of *April* 1779, to the 1ſt of *April* 1780, and during the life of *Eliza Edgley Ewer*. The policy contained a warranty that Sir *Simeon* was about 57 years of age, and in good health when the policy was underwritten, and that Mrs. *Ewer* was about 78 years of age. Two queſtions were intended to have been made; 1ſt. As to the plaintiff's intereſt; 2dly. On the warranty of health. The former was diſpoſed of by the plaintiff's proving a judgment debt.—As to the latter, it appeared in evidence that though Sir *Simeon* was troubled with ſpaſms and cramps, from violent fits of the gout, he was in as good a ſtate of health when that policy was underwritten, as he had enjoyed for a long time before. It was alſo proved by the broker who effected the policy, that the underwriters were told that Sir *Simeon* was ſubject to the gout.—Doctor *Heberdin*, and other gentlemen of the faculty proved that ſpaſms and convulſions were ſymptoms incident to the gout.—Lord *Mansfield*, who tried the cauſe, ſaid;—"The imperfection of language is ſuch, that we have not words for every different idea; and the real intention of the parties muſt be found out by the ſubject matter. By the preſent policy, the life, is warranted, to ſome of the underwriters *in health*; to others, *in good health*; and yet there was no difference, in point of fact: *Such a warranty can never mean, that a man has not in him the ſeeds of ſome diſorder.* We are

are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured (*a*), if he has no sickness at the time, to make it an unequal contract."—There was a verdict for the plaintiff.

If there be no warranty, the insurer takes the risk upon himself.

When there is no warranty the insurer takes the risk upon himself, whatever may be the state of health of the person whose life is insured, unless there be some fraudulent misrepresentation or concealment.

Stackpole v. Simon, at N. P. Hil. Vac. 1779. Park. 437.

The insured refuses to warrant, but the broker tells the first underwriter, that, *from the account he had received, he believed it to be a good life.*—There being no fraud in this, the underwriters run all risks.

Thus:—An insurance was made on the life of *Drury Sheppey*, from the 1st of *April* 1777, to the 1st of *April* 1778.—In an action on the policy, the question was, as to the respresentation of *Sheppey*'s health, at the time the policy was effected. The interest in the life was a debt of 900l. due from *Sheppey* to the plaintiff. It appeared that *Sheppey*, who had a place in the custom house of *Ireland*, went to the south of *France*, for the benefit of his health, or to avoid his creditors, and there died within the time limited in the policy. The broker who effected the policy, told the underwriters, that the gentleman for whom he acted would not warrant any thing; but *from the account he* (the broker) *had received, he believed it to be a good life.*—Lord *Mansfield*, who tried the cause, said;—"As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. When there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of any knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first (*b*); and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the

Every subsequent underwiter may give in evidence any representation made to the first.

(*a*) It is now a practice, in most of the offices for insurances upon lives, to require that, in the proposal for every insurance, it shall be stated, whether the person, whose life is to be insured, has ever been afflicted with the gout.——(*b*) Vid. sup. b. 1, c. 10, § 1.

first.

first. The broker here does not pretend to any knowledge of his own, but speaks from *information* (*a*). There is no fraud in him.—The jury found a verdict for the plaintiff.

(*a*) It is not stated, in the above note, from what information he spoke; but if it had appeared that he spoke without any information on the subject, this, I conceive would have been a misrepresentation that would have avoided the contract. Vid. sup. . b. 1, c. 10, § 1.

CHAP. III.

Of the Interest of the Insured in the Life insured.

Necessity of prohibiting insurances upon lives, without interest.

THE spirit or gaming, which is always ready to insinuate itself into every transaction, and to assume the form of every contract, which depends upon uncertain events, long since availed itself of insurance upon lives, as affording abundant opportunities for speculating upon chances. Wagers came to be daily made upon the duration of men's lives, in the form of insurances, by persons who were neither connected with the parties, nor in any manner interested in the duration of their lives; nor did the insurers much concern themselves to know upon what interest, or for what reason, such insurances were made. Such practices were big with mischiefs of various descriptions; nor is it probable that even the lives, thus presumptuously insured, were always free from danger. The evil, however, at length became apparent to the legislature: But it being admitted, that insurances upon lives, under proper restrictions, might, in many instances, be highly beneficial to the public, it was determined, that such insurances ought not to be abolished, but only regulated.

By 14 G. III., c. 48, any insurance made on any life, or other event, wherein the insured shall have no interest, shall be void.

Therefore, by stat. 14 *G.* III. c. 48, § 1., it is enacted, 'That no insurance shall be made by any person 'or persons, bodies politic or corporate, *on the life or* '*lives* of any person or persons, or *on any other event or* '*events whatsoever* (*a*), wherein the person or persons, for 'whose

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(*a*) The title of this statute is, 'An act for regulating '*insurances upon lives*, and for prohibiting all *such insurances*, 'except in cases where the persons insuring shall have an in- 'terest

'whose use or benefit, or on whose account, such policy or policies shall be made, *shall have no interest, or by way of gaming or wagering:* And that every insurance made contrary to the true intent and meaning of this act, shall be null and void to all intents and purposes whatsoever.'

And (by § 2), it is further enacted, 'That it shall not be lawful to make any policy or policies on the life or lives of any person or persons or other event or events; without inserting in such policy or policies, the name or names of the person or persons interested therein, or for what use, benefit, or on whose account, such policy is so made or underwrote.'

And the name of the person interested in the event shall be inserted in the policy.

And (by § 3,) it is further enacted, 'That in all cases, where the insured hath an interest in such life or lives, event or events, no greater sum shall be recovered, or received from the insurer or insurers, than the *amount or value* of the interest of the insured in such life or lives, or other event or events.

And the insured shall recover no more than the *amount or value* of his interest.

The fourth section contains a proviso that this act shall not extend to insurances *bonâ fide* made on ships or goods.

This act not to extend to marine insurances.

Very few questions have arisen upon the interest of the insured, in the life insured.—A *bonâ fide* creditor has undoubtedly an interest in the life of his debtor, at least where he has only the personal security of the debtor; and it has been holden by a great authority, that this interest is insurable within the statute.

A creditor has an insurable interest in the life of his debtor.

'terest in the life or death of the persons insured.'—From this title it would seem, that the framers of this bill originally intended to confine the operation of it to insurances upon lives only. But the words, '*or any other event or events whatsoever*, introduced not only into the enacting parts, but also into the preamble, plainly shew that the legislature meant, that the regulations of this act should extend to every species of insurance, except marine insurances; to which, by the proviso in the 4th section, it is declared that it shall not extend.—Accordingly, in the case of *Roebuck* v. *Hammerton, Cowp.* 737, the court held that a policy upon the sex of the chevalier *D'Eon* was a wagering policy, and void by this act.

Anderson v. *Edie*, at N. P. B. R. Hil. 1795. *Park* 430.

Thus:—An insurance was made on the life of Lord *Newhaven*, from the 1st of *December* 1792, to the 1st of *December* 1793.—In an action on the policy, the only question was, as to the plaintiff's interest in the life insured, which, it was contended, was not sufficient to take this case out of the above statute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell*, in a large sum of money; part of which debt had been assigned by them to another person; the remainder being more than the amount of the sum insured, was, upon a settlement of accounts between the plaintff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon*, who tried the cause, was of opinion, that this debt was a sufficient interest. He said it was singular that this question had never been directly decided before; that a creditor had certainly an interest in the life of his debtor, because the means by which he was to be satisfied might materially depend upon it; and that, at all events, the death must, in all cases, in some degree, lessen the security.—The jury found a verdict for the plaintiff.

Whether this ought not to be confined to the case where, by the death of the debtor, the creditor must lose his debt.

From the above note of this case, though it seems to be a defective one, it may reasonably be supposed that the plaintiff had only Lord *Newhaven*'s personal security for the debt, and that with him died all hopes of repayment from his estate. Upon this ground I think there could be no doubt but that the creditor had an insurable interest in Lord *Newhaven*'s life, to the amount of the debt. But Lord *Kenyon* is stated to have said, that, "*At all* "*events, the death must, in all cases, in some degree, lessen* "*the security.*"—As an abstract proposition, this is, in general, true. But it cannot be inferred from this, that his lordship meant to lay it down as law, that every creditor, however his debt may be secured, has an insurable interest in the life of his debtor, to the amount of the debt. Lord *Mansfield*, in the case of *Stackpool* v. *Simon* (*a*), says that a policy may be considered as a col-

(*a*) Sup. 772.

lateral

lateral security for the debt due to the insured.—And yet it would seem that, even where the creditor has only the personal security of the debtor to rely upon for repayment, the insurer, before he pays the sum insured, might, perhaps, have a right to call upon the insured, to shew, that nothing could be recovered from the estate of the deceased debtor. Where the debt is amply and satisfactorily secured by mortgage or otherwise, the creditor can have but the shadow of an interest in the life of the debtor. But, by the third section of the above act, it is declared, that '*No greater sum shall be recovered* '*from the insurer than the amount or value of the interest* '*of the insured in the life insured.*'—Now, what can be the *amount or value* of the interest of the creditor, in the case put?—Surely nothing that a jury could estimate.

Since the former impression of this work a case has been determined in the court of King's Bench, which strongly exemplifies and confirms this doctrine.

Godsall & others v. *Boldero* & others, 9 *East* 72.

If after the death of a debtor whose life is insured by a creditor, and before any action brought on the policy, the debt be paid, no action will lie.

The plaintiffs, who were coachmakers in *Long Acre*, on the 29th of *November* 1803, effected an insurance with the *Pelican* life insurance company, on the life of the late Right Honourable *William Pitt* for 500 l. for seven years at an annual premium of 15 l. 15 s.—In an action on the policy, the plaintiffs averred that, "*at the time of making* "*the insurance, and from thence until the death of Mr. Pitt,* "*they were interested in his life to the amount of the sum* "*insured.*"—Upon the trial it appeared that Mr. *Pitt*, at the time of the execution of the policy, and from thence to the time of his death, was indebted to the plaintiffs in more than 500 l. and died insolvent; and that, after his death, and before the commencement of the suit, the executors of Mr. *Pitt* paid to the plaintiffs, out of the money granted by parliament for the discharge of his debts, 1109 l. 11 s. 6 d. in full for the debt due to them from Mr. *Pitt*.—The court determined that the plaintiffs were not entitled to recover.—They held that this insurance, like every other to which the law gives effect, is, in its nature, a contract of *indemnity*, as distinguished from a wager; that the interest which the plaintiffs had in the life of Mr. *Pitt* was that of creditors, in a case

 where

where the probability of payment depended on the continuance of his life, and the indemnity sought by the insurance was against the loss that might result from his death; that the action was therefore founded on a supposed damnification of the plaintiffs, occasioned by his death, *and existing at the time of the action brought*; and therefore if, before the action brought, the damages occasioned by his death were prevented by payment of his debt, the ground of the action was taken away.

The holder of a note for money won at play has not an insurable interest in the life of the maker.

No creditor has an insurable interest in the life of his debtor, unless the debt be incurred upon a *good and legal consideration*; and, therefore, the holder of a note given for money won at play, has not an insurable interest in the life of the maker of the note.

Dwyer v. *Edie*, at N. P. after Hil. 1788. *Park* 432.

As where a policy was effected on the life of *James Russell*, from the first of *June* 1784 to the first of *June* 1785.—By a memorandum at the foot of the policy it was declared, that it was intended to cover the sum of 5,000l. due from *Russell* to the plaintiff, for which he had given his note, payable in one year from the 14th of *May* 1784.—Two objections were made on the part of the defendant; 1st, That part of the consideration for the note, was money won at play; 2dly, That *Russell*, at the time he gave the note, was an infant.—Mr. Justice *Buller*, who tried the cause, nonsuited the plaintiff, upon the ground that part of the consideration for the note, being for a gaming transaction, there was a want of interest in the plaintiff. But as to the objection of the infancy of *Russell*, he said the interest was contingent; for *Russell* might or might not have avoided the note; and he doubted much whether, till so avoided, the note must not be taken, as against a third person, to be the note of a person of full age; and the maker of the note only could take the objection.

The infancy of the debtor cannot be objected by an insurer.

Tidswell v. *Angerstein*, *Peake* 151.

A trustee may insure for the benefit of the *cestuy que trust*.

A trustee may insure for the benefit of the *cestuy que trust*.—As where an insurance was made on the life of one *Holden*, from the 17th of *August* 1790, to the 17th of *August* 1791, and during the life of the plaintiff. *Holden* had granted an annuity to the plaintiff's late brother

brother, which annuity he had bequeathed to perſons not parties to this inſurance, having made the plaintiff executor of his will, and directed him to make inſurance. —In an action on this policy, brought by the executor, it was objected that, as the annuity was not deviſed to him by the grantee, he had no inſurable intereſt in the life of *Holden* the grantor.—But Lord *Kenyon* thought this a ſufficient intereſt in the executor to ſupport the action.

CHAP. IV.

Of the Risks in Insurances upon Lives.

A loss, upon this contract, must always be total.

AS, by the terms of this contract, the entire sum insured is to be paid upon the happening of one single event, which cannot *partially* happen, and by the happening of which, the insured must suffer all the injury against which he meant to be protected by the insurance, the loss must always be total, and never can be partial.

The usual exceptions.

The different insurance companies annex to the contract certain conditions or exceptions.

The *Royal Exchange Assurance* declares every insurance made by a person *on his own life* to be void, if the person, whose life is insured, shall depart the limits of *Europe*, shall die upon the seas, or enter into any military or naval service whatsoever, without the previous consent of the company; or shall die by suicide, duelling, or the hand of justice.

Where the insurance is made by a person, *on the life of another*, death "*by suicide, duelling, or the hand of justice*" is not excepted.

The *Westminster Society* adopts the same exceptions. The *Equitable Insurance*, and the *Pelican Insurance*, adopt the same exceptions, only omitting the word *duelling*, even where the party insures his own life.

To make the insurer liable, not merely the *cause* of the death, but the death itself must appear to have happened *within the time limited*.

We have already seen that, in the case of marine insurances, not only the *cause* of the loss, but the loss itself, must appear to have happened during the continuance of the risk (*a*). The same principle applies to insurances upon lives. And therefore, if a man's life be insured for a year, and some short time before the expiration of the

(*a*) R. *Lockyer* v. *Offley*, 1 T. R. 252, sup. 263, 533.

term, he receive a mortal wound, of which he dies *after the year*, the insurer would not be liable (*a*).

But where it is uncertain whether the death happened within the time limited, this is a question of fact that must be left to the decision of a jury. This is always a question of fact.

Thus: An insurance was made on the life of *L. Macleane* Esq. from the 30th of *January* 1772 to the 30th of *January* 1778. In an action on the policy it appeared, that, about the 28th of *November* 1777, he sailed from the *Cape of Good Hope*, in the *Swallow* sloop of war; which ship, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*.—The question was, whether *Macleane* died before the 30th of *January* 1778. To establish the affirmative of that question, the plaintiff called witnesses to prove the ship's departure from the *Cape* with *Macleane*; and several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th or 14th of *January*, the period of a most violent storm, in which she probably was lost; and that the *Swallow* was much smaller than their vessels, which, with difficulty, weathered the storm.—Lord *Mansfield*, who tried the cause, left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that *Macleane* died before the time limited in the policy; adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict.—They found for the plaintiff. *Patterson* v. *Black*, at N. P. Hil. Vac. 1780.

A question which has often puzzled lawyers, namely; whether a period of time, to commence *from the day of the date*, was inclusive or exclusive of that day, occurred in an action upon a policy upon the life of Sir *Robert Howard*, for one year, *from the day of the date thereof*, which was the 3d day of *September* 1697. Sir *Robert* died on the 3d of *September* 1698, at one o'clock in the morning. *Sir Robert Howard's* case, 2 *Salk.* 625, 1 Ld. Ray. 480. If a policy be to take effect *from the day of the date*, the day of the date is excluded.

(*a*) Per *Willes*, J. in delivering the opinion of the court in *Lockyer* v. *Offley*, 1 T. R. 254.

morning.—Lord C. J. *Holt* held that, *from the day of the date* excludes the day; but *from the date* includes it; and therefore, the day of the date being excluded in this case, the insurer was held liable (*a*).

Reasons why so few litigated questions have arisen in insurances upon lives.

I have now gone through all that seemed to be material upon the subject of insurances upon lives; from which it appears that many of the principles which govern marine insurances are also applicable to this contract. Considering the great multiplicity of insurances which have of late years been made upon lives, the number of litigated cases that have arisen upon them is extremely small. One principal reason is, that the happening of the event insured against is always a fact of easy proof, which can scarcely ever afford any subject of dispute: Another is the great difficulty of practising any fraud in such insurances: But to no cause is this fortunate circumstance more to be ascribed than to the honour,

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(*a*) See the case of *Pugh* v. the Duke of *Leeds*, *Cowp.* 714, in which, after great deliberation, it was held that the words *from the date*, and *from the day of the date*, mean the same thing; that they are taken to be either inclusive, or exclusive, according to the context, and subject matter; and that either meaning shall be adopted which shall most effectually support, not defeat, the intention of the parties.—This may be a very good rule, in the cases to which it applies: But it would have been of no use in the decision of the case above cited; because the intention of the parties, in that case, could only be collected from the policy; and whether they meant to include, or exclude, the day of the date, depended on the grammatical construction of the words contained in it. If, therefore, such a case were again to occur, it must be decided whether the day of the date should be excluded or included; and then, perhaps, Lord *Holt*'s opinion might be thought the best authority upon that point.—Such a question, however, is not again likely to arise; because it is now the usual practice to mention the day both of the commencement and end of the policy, and to declare both to be inclusive.

integrity,

integrity, and liberality of the ſeveral companies engaged in this branch of inſurance.

Return of premium.

As to return of premium, no queſtion upon that ſubject has ever yet, as far as I have been able to learn, occurred in any caſe of inſurance upon lives. If ſuch a queſtion ſhould ariſe, it muſt be governed by the ſame principles which prevail upon that ſubject in marine inſurances. Theſe will be found under the proper head in the firſt book (*a*). Indeed Lord *Mansfield*, on two occaſions, exemplified his doctrine, upon the ſubject of return of premium, by ſhewing their application to the caſe of an inſurance upon a life (*b*).

Remedy againſt the eſtate of a bankrupt inſurer.

With reſpect to the claim which the inſured upon a life ſhall have upon the eſtate of an inſurer become bankrupt during the continuance of the life inſured; this has been determined to be the ſame as in the caſe of marine inſurances (*c*).

(*a*) See book 1, ch. 15, § 2.——(*b*) See his judgment in *Bermon* v. *Woodbridge*, ſup. 662, and in *Tyrie* v. *Fletcher*, ſup. 659.
(*c*) See the caſe of *Cox* v. *Liotard*, *Doug*. 166, n. ſup. 732.

END OF THE THIRD BOOK.

BOOK THE FOURTH.

Of Insurance against Fire.

WE are now arrived at the fourth and last branch of our subject, which may be most conveniently treated under the following heads

I. *Of the Nature of this Contract.*
II. *Of the Interest of the Insured.*
III. *Of the Risk which the Insurers engage to run.*
IV. *Of the Assignment of the Policy.*
V. *Of the Proof of Loss.*

CHAP. I.

Of the Nature of this Contract.

Insurance against fire defined.

BY this contract the insurer, in consideration of a certain premium received by him, either in a gross sum, or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain in his houses or other buildings, stock, goods, and merchandize, by fire, during a limited period of time.

The time of its introduction into *England* unknown.

I have not been able to ascertain the period of the introduction of insurance against fire into this country. But it has certainly been in use here considerably more than a century. Of late years, notwithstanding a very heavy stamp duty imposed upon these insurances, they have been brought into very general, I might almost say universal, use, in this country; particularly in *London* and other cities and large towns.

Very little in use in other countries.

I do not find, however, that this species of insurance is much in use in other countries. It was not till the year 1754 that it came into use at *Paris*. In that year, one of the companies instituted there for marine insurances, obtained from the government permission to make insurances against fire. But they have never, as *Pothier* informs us, become

become general even at *Paris* (a). In *Holland*, though insurance against fire is not altogether unknown, few people seek its protection; perhaps because in that country they can rely so much on their own caution, that they think it unnecessary to pay for any greater security. Indeed I have heard it confidently asserted, by persons well acquainted with the cities both of *London* and *Amsterdam*, that, after making all fair allowances, there is, upon an average, more property destroyed by fire in the former in one year, than in the latter in ten.

Whether in a national point of view it be more hurtful than beneficial.

It cannot be denied that this species of insurance affords great comfort to individuals, and often preserves whole families from poverty and ruin. And yet it has been much doubted, by wise and intelligent persons, whether, in a general and national point of view, the benefits resulting from it are not more than counterbalanced by the mischiefs it occasions. Not to mention the carelessness and inattention which security naturally creates, every person who has any concern in any of the fire-offices, or who has attended the courts of *Westminster Hall* for any length of time, must own that insurance has been the original cause of many fires in *London*, with all their train of mischievous consequences.

The objections to it.

More than counterbalanced by its benefits.

On the other hand, the advocates for this species of insurance, though they admit it to have been sometimes the cause of intentional fires, insist, that, even as a national concern, the benefits vastly outweigh the mischiefs which proceed from it. And when we recollect the precautions used by the different insurance companies, to prevent the spreading of fires, by providing a number of fire engines, which are kept in constant repair, and fit for immediate use, not only in all parts of the metropolis, but in every other considerable town in the kingdom;—by keeping in constant pay, a number of engineers and fire-men, expert in extinguishing fires, and porters for the removal of goods;—by employing a number of these in patrolling the streets at all hours of the night, in constant readiness to fly to the spot from whence

(a) Vid. *Pothier* tit. *Des assurances*, n. 3.

any alarm of fire may proceed: When we recollect that the courage, promptitude, and address of these people often stop the progress of the most dangerous fires, and thereby rescue many valuable lives, and immense property from destruction:—When these benefits, I say, are fairly considered, they seem to outweigh all the disadvantages that can be put in the opposite scale.

Fire insurance companies.

A considerable number of companies have been established in *London* and other parts of the kingdom for insurances against fire. Of these some are called *Contribution Societies*, in which every person insured becomes a member or proprietor, participating in profit and loss. Such are the *Hand in Hand*, and the *Westminster* fire-offices, for the insurance of houses and other buildings; and the *Union* fire-office, for insurance of goods. The other companies insure both houses and goods, at their own risk. Of these the principal are the *London*, and *Royal Exchange*, assurance corporations, the *Sun*, the *Phœnix*, the *British*, and many other offices recently established for this branch of insurance.

Policies against fire are subject to a *stamp* of 1s. and to a *yearly* duty of 2s. 6d. *per cent.* on the sum insured

As to the *duties*, to which this contract is liable, the stat. 44 G. III. c. 98, § 1, repeals all the former *stamp duties* (*a*) imposed on policies of insurance against fire; and, (by § 2.) imposes on every policy, in lieu thereof, a new duty of *one shilling*, and also the *yearly* sum of *two shillings and sixpence* (*b*), for every 100l. and so in proportion for any greater or less sum insured, is laid on every policy for insuring houses, furniture, goods, wares, and merchandize, or other property, from loss by fire.—This statute (*c*) enacts that the provisions of the former acts, except where they are altered by this act, shall extend to the duties imposed by this act.

(*a*) Vid. the schedule A. annexed to this act.—(*b*) Vid. schedule B.—(*c*) § 8.

CHAP. II.

Of the Interest of the Insured.

Whether an insurance against fire without interest be void at common law.

I DO not find that it has ever been a practice to make insurances against fire, avowedly without interest. The probable consequences of such insurances would, I conceive, afford a powerful argument against the legality of any insurance without interest, at common law. If a wager policy be good, at common law, I do not know that it must necessarily assume the form of any particular species of insurance: But if the question, whether a wager policy be a legal contract at common law, were to arise in the case of an insurance against fire, it is impossible to suppose that the judges could ever be prevailed upon to sanction by their authority a contract of so mischievous a tendency.—Lord Chancellor *King*, in the case of *Lynch* v. *Dalzell*, which we shall presently have occasion to cite at large, (*a*) says; "*The party insuring must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction.*" And Lord *Hardwicke*, in the case of the *Sadlers Company* v. *Badcock* (*b*), lays it down as law, "*that the insured must have an interest or property at the time of insuring, and at the time the loss happens.*" So that, according to these two great authorities, it is clear that an insurance against fire, without interest, would have been void at common law. But if any doubt remained upon that question, it has been removed by the stat. 14 G. III. c. 48. That act, though it is entitled, an act for regulating *insurances upon lives*, yet, by the enacting clause, (sect 1.) (*c*), it prohibits all insurances without interest, "*upon any event*

Since the stat. 14 G. III. c. 48. it would be clearly void.

(*a*) Inf. 801.——(*b*) Inf. 804.——(*c*) Sup. 774.

The insured can only recover, in case of loss, to the extent of his interest.

"or events whatsoever" The 4th section, indeed, provides that it shall not extend to marine insurances, which shews that it was the intention of the legislature that it should extend, according to the above words in the enacting clause, to every other species of insurance, and therefore there can be no doubt of its extending to insurances against fire; and consequently the insured, whatever may be the amount of his insurance, can only recover to the extent of his interest.

The necessity of preventing insurances against fire, without interest.

There is reason to believe that insurances against fire are often made to a large amount upon property of very small value. This can only be done with a fraudulent view, and a premeditated fire must be the necessary consequence.—Where a loss has happened, and there is no colour to suspect any unfair practice on the part of the insured, I think the offices ought not to content themselves with being merely just: They ought to be generous and liberal towards a fair sufferer. But where there is any reasonable ground to suspect fraud, it is to be hoped that the managers of no office will, from any false notion of generosity, or any wish to acquire popular favour, so far forget what they owe to the public, as well as to their own characters, as to suffer the claim to be satisfied, without the most scrupulous investigation.

If there be several insurances on the same property, each office must have notice of this.

It often happens that no one office will insure to the full amount required by a particular person, who has a large property to insure; and in such case, the party can only cover his whole interest, by several insurances made at different offices. But then it is proper that each office should have notice of every insurance thus made on the same effects; for otherwise great frauds might be practised by insuring the same property to its full value, at several different offices at the same time. To guard against such frauds, there is, in the printed proposals of each of the offices, an article which declares that, persons insuring must give notice of any other insurance made elsewhere upon the same houses or goods, that the same may be allowed by indorsement on the policy, in order that each office may bear its rateable proportion of

any loss that may happen (*a*). But unless such notice be given of each insurance to the office where another insurance is made on the same effects, the insurance made without such notice will be void.

It is not necessary, however, in order to constitute an insurable interest, that the insured shall, in every instance, have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission, may insure; but with this caution, that the nature of the property be distinctly specified (*b*); and that all the insurances upon the same property, taken together, shall not exceed the full value thereof.

But a person may insure without having the absolute property.

(*a*) Vid. sup. 146.——(*b*) See the 6th article of the proposals of the *Sun* fire-office, and 7th article of the proposals of the *Phœnix* fire-office.

CHAP. III.

Of the Risk, which Insurers against Fire, engage to run.

The risk usually insured against.

BY the terms of the usual policy the insurers undertake to pay, make good, and satisfy to the insured all loss or damage, which may happen by fire, during the term specified in the policy, to the houses or other buildings, furniture, or merchandize insured.

The proviso, excepting fires occasioned by extraordinary events.

By an article of the printed proposals, which, as we shall presently see (*a*), are now to be considered as making a part of the contract, it is provided that, 'No loss or 'damage by fire, happening by any invasion, foreign 'enemy, or any military or usurped power whatsoever, 'will be made good by this company.'

Drinkwater v. *Lond. Assur.* 2 *Wils.* 363.

The words *usurped power*, in the proviso, mean an invasion from abroad or an internal rebellion; not the power of a common mob.

In the following case, a question arose upon the construction of the words *usurped power*, in this proviso.—It was an action of covenant on a policy of the *London Assurance* company against fire, upon a malting office at *Norwich*. The defendants, amongst other pleas, pleaded that the malting office was burned by *an usurped power*; and issue being joined on this plea, the cause was tried at *Norwich* assizes, and a verdict found for the plaintiff, damages 469l. subject to the opinion of the court upon a case, which stated, 'That on the 27th of *November*, a 'mob arose at *Norwich*, on account of the high price of 'provisions, and spoiled and destroyed a considerable 'quantity of flour; that thereupon the proclamation was 'read, and the mob dispersed for that time. That after'wards another mob arose and burnt down the malting 'office mentioned in the policy.'——Lord C. J. *Wilmot*, Mr. Justice *Clive*, and Mr. Justice *Bathurst*, against the

(*a*) Vid. *Oldman* v. *Bewicke*, *Routledge* v. *Burrell*, and *Wood* v. *Worsley*, inf. ch. 5.

opinion

opinion of Mr. Juſtice *Gould*, determined that the true import of the words *uſurped power* in the proviſo, was, an invaſion from abroad, or an internal rebellion, where armies are drawn up againſt each other; when the laws are ſilent; and when the firing of towns becomes unavoidable: But that thoſe words could not mean the power of a common mob.

The words *civil commotion*, were held to exclude losses in the riots of 1780.

The *London Aſſurance* company ſtill, however, retain the proviſo in its original form. The *Sun* fire-office, in the year 172 6/7, added the words *civil commotion* (*a*); and upon the conſtruction of theſe words another queſtion aroſe in conſequence of the tumults with which the metropolis of the *Britiſh* empire was diſgraced in the ſummer of the year 1780. Theſe tumults were excited by certain perſons who, under the maſk of religion, pretended to ſeek the repeal of a law then lately paſſed, granting to *Roman* catholics, certain indulgences and ſome mitigation of the hardſhips under which they, at that time, laboured in this country; but their object was nothing leſs than the entire ſubverſion of the government. And to accompliſh this purpoſe, they excited to univerſal devaſtation, a deſperate and lawleſs rabble, made up of malefactors and fanatics, who, though actuated by different motives, are at all times equally prone to miſchief and rebellion. Fortunately for this country, the militia was at that time embodied, the rioters were repreſſed, and the conſtitution preſerved.

Langdale v. *Maſon* and others, at N. P. Mich. Vac. 1780. MS.

Amongſt others devoted to deſtruction by this deſperate banditti, was Mr. *Langdale*, a catholic, and a conſiderable diſtiller. They fired his premiſes; and all his ſtock

(*a*) Moſt of the other offices have introduced the ſame words; and ſome have the words '*riot, tumult, and civil commotion.*' It is rather remarkable, however, that neither the *Hand in Hand* or the *Union* Fire Office have any proviſo or exception of this nature in their printed propoſals. It were, perhaps, to be wiſhed, that none of the offices would inſure againſt the miſchiefs occaſioned by riot and civil commotion. Men cannot be too deeply intereſted in the preſervation of the public peace, and the ſupport of lawful authority.

of liquors and other effects were there destroyed.—Being insured in the *Sun Fire Office*, he brought his action upon the policy, to recover a satisfaction for the loss he had thus sustained. The office defended this action on the ground that this loss was occasioned by *civil commotion*.—The cause was tried by Lord *Mansfield*, who, in his address to the jury said;—"Most undoubtedly every man's leaning must be to the side of the plaintiff, in order to divide the loss in so great a calamity. But that inclination must be governed by the rules of law and justice; and the only question to be determined arises singly upon the construction of two words in the policy. It appears that in the year 1720, the *London Assurance* company put into their policies all the words here used, except *civil commotion*; and any fire happening by a foreign enemy is clearly provided against, whether they burn houses, or set fire to a town. The words *military or usurped power* are ambiguous; but they have already been the subject of a judicial determination (*a*). They must mean rebellion, conducted by authority; as in the year 1745, when the rebels came to *Derby*; aud if they had ordered any part of the town, or a single house, to be set on fire, that would have been by authority of a *rebellion*. That is the only distinction in the case:—It must be by rebellion got to such a head, as to be under some authority. In the year 1726, the *Sun Fire Office*, in imitation of the *London Assurance* company, inserted the same exception: This provided against rebellion, determined rebellion, with generals who could give orders: But the *Sun Fire Office* did not think this sufficient; and therefore, in the year 1727, they introduced the words *civil commotion*; words as general and untechnical as can possibly be used. They do not say *civil commotion*, such as amounts to *high treason*. They avoid saying civil commotion amounting to *felony* or to a *misdemeanour*, but they use the term "civil commotion," taking the largest and most general sense of the words that the language will allow: They do not

(*a*) Vid. *Drinkwater* v. *Lond. Assur.* sup. 790.

even

even ſay a *riot*. It may be a queſtion, in point of law, whether an aſſembly or multitude be a riot. But the ſingle queſtion here is, whether this has been a civil commotion. If there be a caſe, to which theſe words can be applicable, it is to a caſe of this ſort. I cannot ſee any of the other words, to which it can be applied. Uſurped power takes in rebellion, acting under uſurped authority. From a foreign enemy the office is ſecured: But what is a civil commotion? It is ſomething elſe. The preſent was an inſurrection of the people reſiſting all law, ſetting the authority of the government at nought; and depriving of its protection whoever was obnoxious to them. What was the object and end of this violent inſurrection? It took place in many parts of the town at the ſame time, and the very ſame night; the mob were in *Broad ſtreet*, *St. Catherine's*, in *Coleman-ſtreet*, at *Blackfriar's Bridge*, and at the plaintiff's. What is their object? *General deſtruction, general confuſion. It certainly was meant to aim at the very vitals of the conſtitution.* It was not a private matter, under a cry of *No popery only*, to deſtroy all papiſts. *Newgate* is burnt down: The *Fleet* priſon, the *King's Bench* priſon, the new *Bridewell*, are burnt down, and all the priſoners ſet at liberty. The *Bank* attacked; the *Exciſe* and *Pay* offices in *Broad-ſtreet* threatened. The houſes of a vaſt number of papiſts burned and deſtroyed. Military reſiſtance neceſſary, and an extraordinary ſtretch was made, which was juſtified by neceſſity. Many men have been killed. What is this but a *civil commotion*, if any preciſe meaning can be affixed to thoſe words. It is ſaid that this is a civil commotion diſtinct from uſurped power and rebellion. It is admitted, that this kind of inſurrection may amount to high treaſon: and, to be ſure, it may. But the office do not mean to try whether theſe rioters were guilty of high treaſon or not. It is not put upon that, but on the ground of a civil commotion. It is not an occaſional riot: That would be another queſtion. I do not give any opinion what that might be. You will give your opinions, whether the facts of this caſe bring it within the idea of a civil commotion. I think a civil commotion is this; *an inſurrec-*

tion

tion of the people for general purposes, though it may not amount to a rebellion, where there is an usurped power. If you think it was such an insurrection of the people for the purposes of general mischief, though not amounting to a rebellion, but within the exception of the policy, you will find for the defendants. If not, you will find for the plaintiffs."—The jury found a verdict for the defendants.

But an insurance company who pay a loss, occasioned by riot, may sue the *Hundred* upon the riot act, in the name of the insured.

But Mr. *Langdale* was not without remedy. He afterwards brought his action against the *Hundred*, upon the riot act, 1 *G.* I. c. 5, § 6, and recovered a full satisfaction for the damage he had sustained.—Had the office not been exempted from this loss by the words *civil commotion* in their proposals, they would have had their remedy over against the *Hundred*. In the following case, which came before the court of King's Bench in the year 1782, it was determined that an insurance company, having paid a loss occasioned by riots, may recover back such loss, in an action against the *Hundred*, on the above act, brought in the name of the insured.

Mason v. *Sainsbury*, E. 22 *G.* III. B. R.—MS.

That was an action brought against the *Hundred* on the riot act, stat. 1 *G.* I. c. 5, § 6, to recover a satisfaction for the damage sustained by the plaintiff, by the demolition of his house, in the riots of 1780.—Upon the trial of the cause, there was a verdict for the plaintiff, with 259l. damages, subject to the opinion of the court on a case, which stated, in substance, that the plaintiff had insured his house in the *Hand in Hand* fire office; that the fire office had paid the loss, without any action being brought against them; and that this action was brought against the *Hundred* in the plaintiff's name, and with his consent, for the benefit of the insurance office, and to reimburse them the loss they had paid.—The question was, whether, as the plaintiff had already received a satisfaction, this action could now be maintained against the Hundred on behalf of the insurers.—It was contended on the part of the Hundred, that it was the policy of the act, besides the inducement to suppress riots, to divide the loss, and prevent the ruin of individuals; but there could be no reason of policy or justice to extend this,

beyond

beyond the party himſelf, to bodies or individuals, who have wilfully put themſelves into this danger: That though it was true that a man, having different remedies may purſue either, and it is no defence to the one, that he might have purſued the other; yet, when he has recovered by one, he ſhall not afterwards ſeek a ſecond ſatiſfaction by the other.—But the court were unanimouſly of opinion that the office had a right in this caſe, to recover againſt the Hundred, in the name of the inſured.—Lord *Mansfield* ſaid;—"Though the office paid without a ſuit, this muſt be conſidered as without prejudice; and it is, to all intents, as if it had never been paid. The queſtion comes to this: Can the owner of the houſe, having inſured it, come againſt the Hundred, under this act? Who is firſt liable? If the Hundred be firſt liable, ſtill it makes no difference: If the inſurers be firſt liable, then payment by them is a ſatisfaction, and the Hundred is not liable. But the contrary is evident, from the nature of the contract of inſurance. It is an *indemnity*. We every day ſee the inſured put in the place of the inſurer. In abandonment it is ſo; and the inſurer uſes the name of the inſured. It is an extremely clear caſe. The act puts the Hundred in the place of the treſpaſſers; and on principles of policy, I am ſatisfied that it is to be conſidered as if the inſurers had not paid a farthing."—Mr. Juſtice *Willes* ſaid;—"I cannot diſtinguiſh this from the caſe of an eſcape. If the ſheriff pays, he has his remedy over againſt the party. Though the Hundred is not anſwerable criminally, yet they are not to be conſidered as wholly free from blame. They may have been negligent, which is partly the principle of the act." Mr. Juſtice *Aſhurſt* ſaid;—"At all events the plaintiff is entitled to a verdict to the amount of the premium, having had no compenſation as to that. But, on the larger ground, I am of opinion that the Hundred is liable in this action for all the damage ſuſtained by the plaintiff. It is like the caſe of an abandonment, and the office is not to be in a worſe ſituation for having paid the loſs without a ſuit."—Mr. Juſtice *Buller* ſaid;—"Whether this caſe be conſidered on ſtrict, or on liberal, principles of inſurance law, the plaintiff muſt recover. Strictly,

no notice can be taken of any thing out of the record. The contract with the office, strictly taken, is a wager; liberally, it is an indemnity: But, on the words, it is only a wager, of which third persons shall not avail themselves. It has been rightly admitted that the Hundred is put in the place of the trespassers. How could the trespassers have availed themselves of this satisfaction made by the Office? Could they have pleaded it by way of *accord and satisfaction?* It was not paid as a satisfaction for the trespass, and the facts of the case would not have supported such a plea. The best way is to consider this case as a contract of indemnity, in which the principle is, that the insurer and the insured are as one person; and in that light, the paying before or after, can make no difference."

How far the insured is protected by the policy during the 15 days allowed for paying the renewed premium.

In general, the risk commences from the signing of the policy, unless some other time be specified; and it will of course end with the term for which it is made. Insurances against fire are, in general, either annual, or for a term of seven years at an annual premium; and the offices, as an indulgence to the insured, generally allow 15 days from the expiration of each year for the payment of the premium for the next succeeding year. But the insured has always been considered as being under the protection of the policy till the expiration of the 15 days, provided the premium were paid within that time.

How far in the case of a half-yearly policy.

In the printed proposals of the *Sun Fire Office*, and of some others, there is this article:—'On bespeaking 'policies all persons are to make a deposit for the policy, stamp duty, and mark; and shall pay the premium to the next quarter day, and from thence for one 'year more at least; and shall, as long as the managers 'agree to accept the same, make all future payments 'annually at the said office, within 15 days after the 'day limited by their respective policies, upon forfeiture 'of the benefit thereof; and no insurance is to take place 'till the premium be actually paid by the insured, his, her, 'or their agent or agents.'—In the following case it became a question how far the insured, upon a half-yearly policy,

was

was protected during the 15 days, before the new premium was actually paid and accepted.

Tarleton and others v. Staniforth and others. 5 T. R. 695. 1 *Bos. & Pul.* 483.

The insured in a policy agrees to pay the premium half-yearly, within 15 days of the expiration of the former half year. A loss happens within the 15 days, but before the renewed premium is paid.—The insurers are not liable, though the premium be tendered before the end of the 15 days.

It was an action against the *Liverpool* fire office, which had adopted the above article. The plaintiff declared on a policy dated the 10th of *December* 1788, in which, (after reciting that the plaintiffs had paid 7l. 10s. to the office, and had agreed to pay 7l. 10s. on the 10th of *June* 1789, and the like sum every six months during the continuance of the policy), it was declared that, from the date of the policy, so long as the plaintiffs should pay the sum of 7l. 10s. at the times and places aforesaid, and the trustees or acting members of the society should agree to accept the same, the funds of the society should be liable to pay the plaintiff such damage and loss as they should suffer by fire, not exceeding 6000l. according to the exact tenor of their printed proposals.—The declaration, after setting forth the above article of the printed proposals, stated that the society had, from the year 1777, been in the practice of insuring for periods less than a year, by policies similar to the present, referring, in like manner, to the same printed proposals; and that they had received the premiums within the 15 days after the times limited in such policies, and the policies thereupon remained in force. It then stated a loss, to the amount of 6000l. on the 11th of *December* 1789, before the expiration of the 15 days, and before any refusal to accept the renewed premium, or to continue the policy. There was a second count, stating that before the expiration of the 15 days, the plaintiffs tendered at the office 7l. 10s. to the managers of the society, they not having then disagreed or refused to accept the same.—The defendants, amongst other pleas to the first count, pleaded that the plaintiffs did not pay the sum of 7l. 10s. on or before the 10th of *December*, as they ought to have done, in order to have continued the policy to the time when the loss happened. To the second count they pleaded, that the sum of 7l. 10s. was not tendered to the managers, until after the 10th of *December*.—Upon a demurrer to these pleas, the court determined that, under the above circumstances, the plaintiffs

tiffs were not entitled to recover, and gave judgment for the defendants.—Lord *Kenyon* said;—"It is admitted that the insurance did not extend to half a year and 15 days; and that completely puts an end to the whole case. The plaintiffs stipulated to pay 7l. 10s. half yearly, on the 10th of *June*, and the 10th of *December*; and that they would, *as long as the managers agreed to accept the same*, make their payments within 15 days after the day limited; *but no insurance is to take place until the premium be actually paid.* The continuation of the term, therefore, depends on two circumstances which must both concur; namely, that the insured should pay the 7l. 10s. and that the insurers should agree to accept that sum. Barely stating these facts is sufficient to shew that the plaintiffs are not entitled to recover."— This judgment was afterwards affirmed in the *Exchequer Chamber*.

But several offices hold themselves liable during the 15 days *on annual policies.*

Soon after the above decision, the *Royal Exchange*, the *Phœnix*, and some other insurance companies, gave notice that they did not mean to take advantage of this judgment; but would hold themselves liable for any loss during the 15 days that are allowed for the payment of the renewed premium upon annual policies, and others for a longer period: But that every policy for a shorter period than a year, would cease at six o'clock in the evening of the day mentioned therein.

If the insurance company, having an option to determine the insurance at the end of the year, give the insured notice of their intention to do so, they are not liable for a loss happening within the 15 days after the end of the year.

If it be agreed by the policy that the insurance shall continue as long as the insured shall continue to pay the stipulated premium, *and the company shall agree to accept it*; and, by the printed proposals, the company agree that persons insured for a year or more should be considered as insured for 15 days *beyond the expiration of their policies*; and the company, before the expiration of the year, give the insured notice to pay an increased premium, otherwise they would not continue the insurance, and the insured refuse this; the company is not liable for any loss upon this policy happening within the 15 days after the expiration of the year, though the insured, after the loss happened, and before the expiration of the 15 days, tender the full premium which had been demanded.

For

For the effect of the whole contract being only to give the insured an option to continue the insurance. or not, during the 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the company have not, before the end of the year, determined the option by giving notice that they would not renew the contract (*a*).

(*a*) R. *Salwin* and others v. *James* and another, 6 East 571.

CHAP. IV.

Of the Assignment of the Policy.

An assignment of the policy to one who has no interest in the effects insured, is void.

A POLICY of insurance, being a *chose in action*, is, in strictness, not assignable at law. But, like every other chose in action, it may be assigned in equity; and courts of law now take notice of such assignment; so that the ancient rule of the common law, being often found injurious to the interests of a commercial country, is now, in a manner, disregarded, or at least evaded. But the mere assignment of the policy, would be of little avail, without an assignment of the subject matter of the insurance also. The assignee could derive no benefit from the policy, unless the interest of the insured were transferred with it; because, as we have already shewn, the insured must not only have an interest in the subject matter of the insurance, at the time of insuring, but also at the time the loss happens (*a*).

Upon the death of the insured, the policy is continued to his representative.

In the printed proposals of all the offices it is declared that, upon the death of an insured, his interest in the policy shall be continued to his representative to whom the property belongs, provided such representative, before any new payment be made, procure his right to be indorsed on the policy at the office.

The contribution societies seem to allow the assignment of their policies without any express permission.

In the proposals of the *Hand in Hand* fire office, it is declared, that if the premises insured should be assigned, the assignment must be entered at the office; and that assignments of policies shall be entered at the office, within 42 days after they are executed; or else the assignee shall have no benefit thereby. And in the proposals of the

(*a*) Per Lord *King*, Ch. in *Lynch* v. *Dalzell*, inf. 801; Per Lord *Hardwicke* Ch. in the *Sadlers Company* v. *Badcock*, inf. 804; vid. sup. 787.

Union fire office, it is declared that every member transferring his policy, shall, within three months, give notice to the directors, and bring his policy to the office, to have such transfer indorsed.

The *Westminster* office merely requires that the assignment shall be entered at the office as soon as possible. So that, it would seem, the policies of these three *contribution societies* may be assigned, without any express permission from the respective offices for that purpose; and that it is sufficient if the assignment be brought there to be entered.

But the other offices give notice, generally upon the policy, that it shall be of no force if assigned, unless such assignment be allowed by an entry in the books of the office, or indorsed on the policy. So that it seems to be a settled rule in all those offices, not to allow any transfer of any policy, without the consent of the managers. This is perfectly reasonable. The offices may chuse for whom they will insure; they are not obliged to insure for every person that may apply to them. In some instances, character may be a sufficient reason for a refusal. But the offices would be deprived of this option, if any person insured might assign his policy to whom he pleased, without their concurrence. This will appear from the following case.

But the other offices allow of no assignment without their express permission.

On the 28th of *July* 1721, one *Richard Ireland* obtained a policy from the *Sun* fire-office for the insurance of his house, being the *Angel* inn at *Gravesend*, with his goods therein, from loss and damage by fire: And it was agreed, that so long as *Ireland* should pay five shillings a quarter, the society would satisfy the said *Ireland*, his executors, administrators, and assigns, his loss not exceeding 1000l. according to the exact tenor of their printed proposals.—Some considerable time afterwards, *Ireland* died, leaving his son *Anthony* his sole executor, who brought the policy to the office, and had an indorsement made thereon, that the same belonged to him; and he afterwards paid one year's premium up to *Christmas* 1727. In *August* 1727, the house was destroyed by fire; and some time afterwards, the plain-

Lynch and another v. *Dalzell* and others, 3 *Bro. Parl. Ca.* 497.

The insured upon a house and goods assigns the house to *A.* and the goods to *B.*; *B.* assigns the goods over to *A.* to secure to *A.* the money advanced for *B.* to purchase them. Afterwards a fire happens, and the insured assigns the policy to *A*; and *B.* also assigns to him his interest in the policy. These assignments of the po-

licy being made after the fire happened, and without the consent of the office, the assignee cannot recover the loss under it.

tiffs applied to the office, and alleged that they had purchased the house and goods of *Anthony Ireland*; that the same were their property at the time of the fire; and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit from *Roger Lynch*, in which he swore that their loss, by the burning of the house, amounted to 500l. and upwards; and upon this affidavit was indorsed the usual certificate from the minister and churchwardens, &c.: But neither in the affidavit or certificate, was any mention made of any loss being sustained by the plaintiffs by the burning of any goods; nor was any affidavit made by *Anthony Ireland*, that he had suffered any loss.—The plaintiffs, however, insisted that the office should pay them 1000l. for their loss by the burning of the house and goods; and they filed a bill in chancery, setting forth, that *Anthony Ireland*, on the 24th of *June* 1727, for 250l., assigned to them a lease of the house and stables; but that the goods for which the plaintiffs, as they alleged, were to pay 500l., being intended for one *Thomas Church*, who was to hold the inn under them, *Ireland*, by bill of sale of the same date, sold the same to *Church* for his own use. The bill also stated the assignment of the policy to the plaintiffs; and that, although the bill of sale of the goods was made to *Church*; yet that the plaintiffs paid the purchase money, and *Church* assigned the bill of sale to them for securing it; and also released to the plaintiffs his interest in the policy.—The defendants, by their answer, alleged that the affidavit produced was not agreeable to the proposals; that no assignment of the policy was made to the plaintiffs, nor any assignment of it made to them by *Church*, till after the fire. They insisted that the policies issued by the office were not in their nature assignable, being only contracts to make good the loss which the contracting party *himself* should sustain; and that no other person was entitled to any benefit from it. The cause proceeded to issue; and witnesses being examined on both sides, it appeared upon the plaintiff's own evidence, that the argeement for the assignment of the policy, (if any), was not till after the agreement for

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the purchase of *Ireland*'s term in the house; and that the assignment of it, though bearing date *before*, was not made till some time *after* the fire: So that the agreement for assigning the policy was a voluntary concession on the part of *Ireland*, and independent of the bargain for the house, and not made till after *Ireland*'s interest in the house was determined; nor carried into execution till after the loss had happened. And as to the plaintiff's property in the goods, they proved an assignment from *Church* to them, as a security for 300l.; but omitted to state *when* this assignment was made, though the defendants, by their answer, had put the time in issue.—Upon this case, the Lord Chancellor *King* dismissed the plaintiff's bill.—He said;—"These policies are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same, as incident thereto, by any conveyance or assignment: But they are only special agreements with the persons insured, against such loss or damage as they may sustain. *The party insured must have a property at the time of the loss, or he can sustain no loss: and consequently can be entitled to no satisfaction.* There was no contract ever made between the office and the plaintiffs for any insurance on the premises in question. Not only the express words, but the end and design of the contract with *Ireland*, do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by *Richard Ireland* only; and the indorsement on the policy transferred that right to his executor *Anthony Ireland* only. These policies are not in their nature assignable; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing the property backwards and forwards, and rendering it uncertain whose the true property really was, raise a suspicion, and fully justify the caution of the office in preventing the assignment, without the consent of the managers; which method is pursued by all the insurance offices. Besides, the plaintiff's

The policy does not pass with the effects insured.

The policy is only assignable with the consent of the office.

claim is, at best, founded only on an assignment never agreed for, till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened."—Upon appeal to the House of Lords, the decree of the Court of Chancery was affirmed.

The Sadler's Company v. *Badcock* and others, 2 *Atk.* 554.

A lessee having an unexpired term of six years and an half in a house, insures for seven years. After the term expired the house is burnt, and afterwards, but before the expiration of the policy, the insured assigns it to the reversioner, without the concurrence of the office.—The assignee cannot claim any benefit under the policy,

The same principles were adopted in another case, where one *Anne Strode*, having six years and a half to come in a lease of a house from the plaintiffs, on the 27th of *April* 1734, insured the house for 400l. in the *Hand in Hand* fire office, for seven years, and thereby became a proprietor; and, on paying twelve shillings down, and 3l. some time after, the company agreed, out of their contribution stock, '*to pay the said sum of* 400l. '*to her, her executors and assignees, so often as the house* '*should be burnt down during the said term, unless the di-* '*rectors should rebuild the same*;' and on the back of the policy it was indorsed, '*that if the policy should be assigned,* '*the assignment must be entered within* 21 *days after the* '*making thereof.*'—Mrs. *Strode*'s lease expired at *Midsummer* 1740; the house was burnt down in *January* 1741; and she assigned the policy to the plaintiffs on the 23d of *February* 1741. The plaintiffs tendered the assignment to the defendants to be entered in their books, but they refused to accept it. The company, in 1738, which was subsequent to Mrs. *Strode*'s policy, made an order, 'That 'whereas policies expire upon the property of the in- 'sured's ceasing; if there is no application of the in- 'sured to assign, or to have the loss made up, then 'the person having the property, may insure the said 'house in the said office, notwithstanding the term 'for which the said house was originally insured is 'not expired.' The question upon this case was, whether the plaintiffs, the assignees of Mrs. *Strode*, were entitled to the benefit of the policy.—The court determined that they were not entitled to any benefit under it.—The Lord Chancellor *Hardwicke* said;— "During the progress of this cause, while the defendants seemed to depend chiefly upon the subsequent order,

I was

I was of opinion against them. But, upon hearing what was further offered, I think the plaintiffs are not entitled to be relieved. There may be three questions made in this cause. *First*, Whether this accident, which has happened, be such a loss, as obliges the defendants to make satisfaction to the plaintiffs. *Secondly*, whether upon the terms of the original policy, the office be obliged to do it. *Thirdly*, which is rather consequential of the former, whether the plaintiffs are properly assignees of Mrs. *Strode* under this policy. If this matter rested singly upon the policy itself, I should not think it such a loss, as would oblige the defendants to make satisfaction. Under this policy, the state of the case is, Mrs. *Strode* was only a lessee; her time expired at *Midsummer* 1740; the house was burnt down in *January* after, *within the seven years*; the plaintiffs, the *Sadler's Company*, were ground landlords, and entitled to the reversion of the term: Upon the 23d of *February*, seven months after the expiration of the term, and one month after the fire, the assignment was made, and in consideration of five shillings only; so that it must be taken as a voluntary assignment, as it stands before me. It has been insisted, on the part of the defendants, that the plaintiffs are not entitled to recover, as standing in the place of Mrs. *Strode*, because she had no loss or damage, her interest ceasing before the fire happened. And this introduces the second and third questions. I am of opinion, that it is necessary the party insured should have an interest or property at the time of insuring and at the time the fire happens. It has been said for the plaintiffs, that it is in nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there, *interest or no interest* is almost constantly inserted; and if not inserted, you cannot recover, unless you prove a property. By the first clause in the deed of contribution in 1696, the year this society, called the *Hand in Hand Office*, incorporated themselves, the society are to make satisfaction in case of any loss by fire. To

whom, or for what loss, are they to make satisfaction? Why to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring *the thing*, for there is no possibility of doing it, and therefore, must mean insuring *the person* from damage. By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens. It has been truly said, this gives the society an option to pay or rebuild, and shews most manifestly that they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick; for anoother person might fancy a house of a different kind. Thus it stands upon the original agreement. The next question will be, whether the subsequent order made by the defendants in 1738, has made any alteration. I am of opinion that it has not; for it was made only to explain a particular case in the policy, for it might have been a question, whether Mrs. *Strode* could have come before the expiration of the term, to examine the books of the office, and therefore this order was made to give her such a power. It has been strongly objected that the society could not make such an order. I am very tender of saying, whether they can or not. Because, on the one hand, it might be hard to say, that, as a society, they cannot make any order for the good of the society; On the other hand, it would be a dangerous thing to give them a power to make an alteration, that may materially vary the interest of the insured. The assignment is not at all within the terms of this order, because it is plain, it meant an assignment before the loss happened. Now with regard to the loss happening before the assignment made, Mrs. *Strode* was entitled to nothing but what was to be paid back upon the deposit. It is plain she thought so, for if she had imagined she had been entitled to 400l. would any friend have advised her to make a present of it to the plaintiff? The case of *Lynch* v. *Dalzell*, in the House of Lords, shews how strict this court and that house are, on the construction of policies, to avoid frauds."

The foregoing determinations shew that, upon an assignment or other transfer of the property insured, the assignee should be very careful to get the policy regularly transferred to him, by the proper indorsement at the office. And in a former part of this work, (*a*) it was shewn that if the assignor undertake to get this done, he will be liable to the assignee for all the consequences of neglecting or omitting to do so; even though his undertaking were merely gratuitous.

If an assignor of the property insured undertake to get the policy transferred to the assignee, he will be liable to an action for neglecting to do so.

(*a*) Vid. *Wilkinson* v. *Coverdale*, sup. 289.

CHAP. V.

Of the Proof of Loss.

The account of the loss, the affidavits of the insured, and the certificate from the minister, &c. required by the printed proposals.

THE form of the policy is nearly the same in all the offices (*a*). The principal difference between them consists in the terms of certain *proposals*, as they are called, to which it refers, as making a part of the contract. One principal article, which is found in the proposals of several of the offices imports,—' That persons insured sustaining any loss or damage by fire are forthwith to give notice thereof at the office, and, as soon as possible afterwards, deliver in as particular an account of their loss and damage, as the nature of the case will admit of; and make proof of the same by their oath or affirmation, according to the form practised in the said office; and by their books of accounts, or other proper vouchers, as shall be reasonably required; and procure a certificate under the hands of the minister and churchwardens, together with some other reputable inhabitants of the parish, not concerned in such loss, importing,—That they are well acquainted with the character and circumstances of the person or persons insured, and do know or verily believe, that, he, she, or they, really and by misfortune, without any fraud or evil practice, have sustained by such fire, the loss and damage, as his, her, or their loss, to the value therein-mentioned: But, till such affidavit and certificate of such insured's loss shall be made and produced, the loss money shall not be payable. And, if there appear any fraud or false swearing, such sufferers shall be excluded all be-

(*a*) Vid. Appendix No. VII.

'nefit by their policies.' In the policies of these offices the insurers undertake to pay the loss, not exceeding the sum insured, '*according to the exact tenor of their printed* '*proposals*,' describing their proposals by their respective dates.

The above article, though not worded in the best possible manner, has undoubtedly a very beneficial tendency. Nothing can be more reasonable in a case where there is so great a temptation to fraud, than to require a testimonial from persons in public situations in the parish where a fire has happened, who have opportunities of informing themselves as to the characters of the insured, and the fairness of their claims; and who are not likely to connive at any fraud. "It is a duty," says Mr. Justice *Lawrence* (*a*), "that the office owes to the public as well as to themselves, to take every precaution to protect themselves against fraud. And unless some such check as the present were interposed, the office would be holding out a premium to wicked men to set fire to their own houses."—Perhaps it may, some time or other, be thought advisable for all the insurance companies to agree among themselves to have this article revised, and put into a more unexceptionable form, and to adopt it universally. The construction of this article has given occasion to several judicial decisions.

The reasonableness of requiring this proof.

The first was an action against the directors of the *Sun Fire Office*, upon one of their policies. The plaintiffs, in their declaration, after stating that the bankrupt, the insured, had conformed to the above article, as to the notice, account, and affidavit of the loss; stated that the minister of the parish of *Portsea*, in which the loss had happened, resided at a distance from the parish, and was wholly unacquainted with the character and circumstances of the insured, and unable to make the certificate required by the policy; but that the insured had procured and delivered to the office a certificate under the hands of several reputable inhabitants of the

Oldman and others, assignees of *Ingram*, v. *Bewicke* and others, 2 H. *Bl.* 577. n.

To excuse the want of the certificate, it is not enough to allege that the minister resides out of the parish, and does not know the insured. And the want of this certificate is a defect of title, for which the court will arrest the judgment, after the plaintiff has obtained a

(*a*) 6 T.R. 722.

verdict on the question of fraud, and want of interest,

the tenor required by the article. The defendants pleaded 1st, That the premises were wilfully set on fire, and burnt down by the insured. 2dly, That at the time of the supposed loss the insured had no interest in the premises. No notice was taken in any of the pleas, of the want of the certificate.—Issues being joined on the above pleas, the cause went to trial, and the jury found a verdict for the plaintiffs, damages 300l.—The demand was 1500l. the sum insured.—The defendants moved in arrest of judgment, on the ground that the plaintiffs had not set forth in their declaration a sufficient title to recover upon the policy against the defendants.—In answer to this application it was said that it was grounded either on the title being defective, or defectively set forth: That the latter objection was cured by the verdict, and the former waived by the defence set up in the pleas.—The court, however, arrested the judgment.—Lord *Loughborough* said,—"Though I am satisfied the verdict was right, that the fire was accidental, and that the certificate could not have been procured, because the insured had not sustained all the loss he claimed; yet the rule of intendment after verdict cannot be applied where there is an absolute defect of title, as there is in this case.—As to the pleas, they are wholly collateral to the title."—Mr. Justice *Gould* said,—"Till the affidavit is made, and the certificate procured, the money is not payable: The time of payment, therefore, is not yet come.—Though a person were a *bonâ fide* sufferer, still he is not entitled without a certificate. The stipulation is a condition precedent, that there shall be a certificate to shew that there is no kind of fraud. Nothing is said about the churchwardens; and the excuse of the minister living at a distance is frivolous."

Routledge v. *Burrell*, and anr. 1 H. *Bl.* 254.

The article of the printed proposals requiring the certificate, though without stamp, seal, or signature, and though only re-

The next case upon this subject was an action of covenant brought by the executrix of the insured on a policy of the *Sun Fire Office*.—The declaration, by way of excuse for not producing the certificate required by the above article, stated that the testator, the insured, after the loss, being entitled to such certificate, applied to the minister and churchwardens, and to many reputable inhabitants to procure such certificate; but that the defendants.

fendants, by falſe inſinuations, and promiſes of indemnity, prevailed on the miniſter, &c. to refuſe to ſign it. —The defendants, as to the firſt breach of covenant, pleaded, 1ſt, That the inſured had no intereſt in the goods, &c. inſured; and 2dly, That they did not prevail on the miniſter, &c. to refuſe to ſign the certificate. —And as to the ſecond breach, they pleaded, 1ſt, No intereſt; and 2dly, That neither the teſtator in his life time, nor the plaintiff ſince his death, had procured ſuch certificate.—Iſſue was joined upon the three firſt pleas, and the plaintiff demurred to the laſt.—In arguing that demurrer, it was contended on the part of the plaintiff, 1ſt, That a condition or reſtriction could not be annexed to, and made part of a deed, by words of mere reference to a printed paper, diſtinguiſhed only by the date of the year in which it was printed, without any ſignature, ſeal, or ſtamp, to give it authenticity; and 2dly, That the reſtriction in queſtion, though it were properly annexed to the deed, was bad in itſelf. Many authorities were cited in ſupport of theſe propoſitions: But the court ſaid that the matter was too clear to admit of a doubt, and gave judgment for the defendants.

ferred to in the policy, is part of the contract, and is binding on the inſured.

At length, in the following caſe, it has been fully ſettled, after ſolemn argument, and upon full deliberation, that the printed propoſals are to be taken as part of the policy; that the procuring of the certificate from the miniſter and churchwardens, &c. is a condition precedent to the payment of the loſs; and that the inſured has no title to demand any loſs, without this certificate, though he ſhould be able to ſhew that the miniſter and churchwardens had wrongully refuſed to ſign one.

It is now ſettled that the procuring the certificate is a condition precedent to the payment of any loſs; and that its being wrongfully refuſed will not excuſe the want of it.

That was an action brought by the aſſignees of the inſured, who had become bankrupts, againſt the *Phœnix* inſurance company. The plaintiffs in their declaration, after ſtating the loſs, and notice to the office, alleged that the bankrupts, ſoon after the loſs, procured and delivered to the company a certificate under the hands of divers reputable houſeholders in the pariſh, in the uſual form; and that, '*as ſoon as poſſible after the loſs, 'they applied to, and requeſted, the miniſter and churchwar-*

Wood and others aſſignees of *Lockyer* and *Bream* v *Worſley*, 2 H. Bl. 574. 6 T. R. 710.

'*dens*

'*dens of the parish to sign such certificate; but that the said*
'*minister and churchwardens, without any reasonable or pro-*
'*bable cause whatsoever, did wrongfully and unjustly refuse to*
'*sign any such certificate as aforesaid.*'—There was another similar count, only omitting the request to the minister and churchwardens' to sign the certificate, and their refusal.—To the first count, the defendant pleaded; 1st, Want of interest in the bankrupts; 2dly, That the loss happened by fraud; and 3dly, That the minister and churchwardens did not wrongfully, and without probable cause, refuse to sign the certificate.—To the second count, the defendant pleaded similar pleas, as to want of interest and fraud; and 3dly, That neither the bankrupts nor the plaintiffs had procured any certificate from the minister, churchwardens, and reputable inhabitants, as is required by the said printed proposals.—By the replication issue was joined on the first five pleas; and as to the last plea, the plaintiffs assigned the same excuse for the want of the certificate from the minister, &c. as in the first count of the declaration; and this having proceeded to issue, the cause was tried and the plaintiffs obtained a verdict for 3,000l.—The defendant moved in arrest of judgment on the same ground, as in the case of *Oldman* v. *Bewicke* (*a*), namely, that the production of the certificate was a condition precedent to the payment of the loss, and that the plaintiffs not having averred performance, had shewn no title to recover.—After the argument, Lord C. J. *Eyre*, Mr. Justice *Buller*, and Mr. Justice *Rooke*, seemed to be of opinion that, supposing the printed proposals to be conditions precedent, there had been a performance *cy pres*; but that, in truth, the policy being a commercial contract, was to be construed liberally, and the true question was, whether the loss had been fairly incurred. If it had, and it appeared on the record to have so happened, the refusal of the minister and churchwardens was without cause, and therefore the plaintiffs were entitled to maintain their action. But Mr. Justice *Heath* appeared to differ from

(*a*) Sup. 809.

the

the reſt of the court, and time was taken to deliberate. Afterwards, judgment was given for the plaintiffs, *pro formâ*, as it was underſtood that a writ of error would be brought, whichever way the judgment ſhould be given. —Upon this writ of error, the court of King's Bench, after two arguments, reverſed the judgment of the court of Common Pleas, being unanimouſly of opinion that the production of the certificate was a condition precedent.— Lord *Kenyon* ſaid he did not ſee how the term *cy pres* was applicable to this ſubject; that the argument founded on this, went to ſhew that if none of the inhabitants of this pariſh would certify, a certificate from the inhabitants of the next, or of any other pariſh, would have anſwered the purpoſe. But he ſaid that the inſured could not ſubſtitute other terms or conditions in lieu of thoſe which all the parties to the contract had originally made.

END OF THE FOURTH BOOK.

APPENDIX.

No. I.

Form of a valued Policy of Insurance upon Ship and Goods, by Private Underwriters.

£. 10,000
———S.G.
Delivered the
Day of

IN the name of God, *Amen.* as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain, in part or in all, doth make assurance, and ca se and them, and every of them, to be insured, lost or not lost, at and from upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery boat, and other furniture, of and in the good ship or vessel called *The* whereof is master, under God, for this present voyage or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called: Beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship upon the said ship, &c. and so shall continue and endure during her abode there, upon the said ship, &c.: And further, until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at upon the said ship, &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same be there discharged and safely landed; And it shall be lawful for the said ship, &c. in this voyage, t proceed, and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance; the said ship, &c. goods and merchandizes, &c. for so much as concerns the assureds by agreement between the assureds and assurers, in this policy are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of

of the ſeas, men of war, fire, enemies, pirates, rovers, thieves, jettiſons, letters of mart and countermart, ſurprizals, taking at ſea, arreſts, reſtraints, and detainments of all kings, princes and people, of what nation, condition, or quality ſoever, barratry of the maſter and mariners, and of all other perils, loſſes, and misfortunes, that have or ſhall come to the hurt, detriment, or damage, of the ſaid goods and merchandizes, and Ship, *&c.* or any part thereof; and in caſe of any loſs or misfortune it ſhall be lawful to the aſſureds, their factors, ſervants, and aſſigns, to ſue, labour and travel, for, in, and about, the defence, ſafeguard, and recovery, of the ſaid goods and merchandizes, and ſhip, *&c.* or any part thereof, without prejudice to this inſurance, to the charges whereof we the aſſurers will contribute each one according to the rate and quantity of his ſum herein aſſured: And it is agreed by us the inſurers that this writing or policy of aſſurance ſhall be of as much force and effect as the ſureſt writing or policy of aſſurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elſewhere in *London*: And ſo we the aſſurers are contented, and do hereby promiſe and bind ourſelves, each one for his own part, our heirs, executors, and goods, to the aſſureds, their executors, adminiſtrators, and aſſigns, for the true performance of the premiſes, confeſſing ourſelves paid the conſideration due unto us for this aſſurance by the aſſured
at and after the rate of
In witneſs whereof we the aſſurers have ſubſcribed our names and ſums aſſured in *London*.

N. B. Corn, fiſh, ſalt, fruit, flour, and ſeed, are warranted free from average, unleſs general, or the ſhip be ſtranded; —Sugar, tobacco, hemp, flax, hides, and ſkins, are warranted free from average under five pounds *per cent.*; and all other goods, alſo the ſhip and freight, are warranted free of average under three pounds *per cent.* unleſs general, or the ſhip be ſtranded.

No. II.

Form of a Policy of Insurance on Ship and Goods, by the Royal Exchange Assurance Company.

S. G. } S. G. No.
N. } L.

By the Corporation of the *Royal Exchange* Assurance.

IN the Name of God, *Amen*.
as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain, in part or in all, doth make assurance, and causeth and them, and every of them to be assured, lost or not lost, upon any kind of goods and merchandizes whatsoever, loaden or to be loaden, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called *The* burthen, or thereabouts, whereof is master (under God) for this present voyage or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship or the master thereof is or shall be named or called: Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof on board the said ship and upon the said ship, &c. and so shall continue and endure during her abode there upon the said ship, &c. and further until the said ship, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at upon the said ship, &c. until she hath there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same be there discharged and safely landed: And it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to this Assurance, the said ship, &c. goods and merchandizes,

merchandizes, &c. for so much as concerns the assureds, (by agreement made between the assureds and the said corporation in this policy) are and shall be rated and valued at

, Sterling, without farther account to be given by the assureds for the same. Touching the adventures and perils which the said corporation are contented to bear and do take upon them in this voyage, they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprizals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, and ship, &c. or any part thereof: And in case of any loss or misfortune it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about, the defence, safeguard, and recovery, of the said goods and merchandizes, and ship, &c. (or any part thereof), without prejudice to this assurance, to the charges whereof the said corporation will contribute according to the rate and quantity of the sum herein assured; And it is agreed by the said corporation that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*: And so the said corporation are contented, and do hereby promise and bind themselves and their successors to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance by

at and after the rate of

per cent. In witness whereof the said Corporation have caused their common seal to be hereunto affixed, and the sum or sums by them assured to be hereunder written, at their office in the *Royal Exchange* of *London* this Day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

The said corporation are content with this assurance for

Free

Free from all average on corn, flour, fish, salt, fruit, seed, hides, and tobacco, unless general, or otherwise specially agreed.

Free from average on sugar, rum, skins, hemp, and flax, under five *per cent.*; and on all other goods, and on ship, under three *per cent,* except general.

By order of the Court of Directors.

No. III.

Form of a Policy of Insurance on Ship and Goods by the London Assurance Company.

SHIP AND GOODS.

London Assurance House.

No. No. in *London.*

By the Governor and Company of the *London* Assurance.

IN the name of God, *Amen.* as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall, appertain, in part or in all, doth make assurance, and causeth and them, and every of them, to be assured, lost or not lost, at and from upon any kind of goods and merchandizes whatsoever; and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called *The* whereof is master (under God) for this present voyage or whoever else shall go for master in the said ship or vessel, or by whatsoever other name or names the said ship or vessel, or the master thereof, is or shall be named or called; Beginning the adventure upon the said goods and merchandizes from and immediately following the loading thereof aboard the said ship or vessel at and upon the

the said ship or vessel, &c. and so shall continue and endure during her abode there, upon the said ship or vessel, &c.; and farther, until the said ship or vessel, with all her ordnance, tackle, apparel, &c. and goods and merchandizes whatsoever, shall be arrived at and upon the said ship or vessel, &c. until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes, until the same be there safely discharged and landed; And it shall be lawful for the said ship or vessel, &c. in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever without prejudice to this assurance, the said ship or vessel, &c. goods and merchandizes, &c. for so much as concerns the assureds, (by agreement between the assureds and the *London* assurance), are and shall be rated and valued at without farther or other account to be given by the assureds for the same. Touching the adventures and perils, which the said *London* assurance are contented to bear and do take upon them in this voyage, they are, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprizals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage, of the said goods and merchandizes, and ship or vessel, &c. or any part thereof: And in case of any loss or misfortune, it shall be lawful to the assureds, their factors, servants, and assigns, to sue, labour, and travel, for, in, and about, the defence, safeguard, and recovery, of the said goods, merchandizes, and ship or vessel, &c. or any part thereof, without prejudice to this assurance, to the charges whereof the said *London* assurance will contribute according to the rate and quantity of the sum herein assured: And it is agreed that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in *Lombard Street*, or in the *Royal Exchange* or elsewhere in *London*: And so the said *London* assurance are contented, and do hereby promise and bind themselves and their successors to the assureds, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for this assurance by the assured, at and after the rate of *per cent.* In witness whereof the

said

ſaid *London* aſſurance have cauſed their common ſeal to be hereunto affixed, and the ſum or ſums by them aſſured to be hereunder written, at their office in *London*, this day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord

Free from all average on corn, flour, fruit, fiſh, ſalt, and ſeeds, except general.

Free from average on ſugar, rum, hides, ſkins, hemp, flax, and tobacco, under five pounds *per cent.*; and on all other goods, and ſhip, under three pounds *per cent.* except general.

The ſaid governor and company are content with this aſſurance for

No. IV.

Form of a Bill of Bottomry, by deed poll, where the Ship is to go to several Ports.

TO ALL PEOPLE, &c. I *A. B.* of, &c. mariner, master, and part owner of the good ship or vessel called, &c. of *London*, of the burthen of two hundred tons, or thereabouts, now riding at anchor in the river *Thames*, within the port of *London*, do send greeting; WHEREAS the said ship is now bound out upon a voyage from the said port unto the island of *Barbadoes*, and from thence, if occasion shall be, to the island of *May*, and so to return back again to the said island of *Barbadoes*, and thence to *London*, to end her voyage; NOW KNOW YE, that I the said *A. B.* for myself, my executors and administrators, do covenant and grant, to and with *C. D.* of &c. (who, before the sealing and delivery hereof, hath paid and advanced unto me the said *A. B.* the sum of 500l. of lawful money of *Great Britain*, and is contented and hath agreed to stand to, and bear the adventure of the said sum upon the body of the said ship, during the said voyage), and to and with the executors, administrators, and assigns of the said *C. D.* by these presents; That the said ship, with the first good wind and weather after the ...... day of .... next ensuing the date hereof, shall depart from the said river *Thames*, on the said intended voyage, and shall by God's grace, (the perils and dangers of the sea, and restraint of princes and rulers excepted), return into the said river *Thames* from her said voyage before the expiration of fourteen months, to be accounted from the date of these presents; and that the said ship, in her said intended voyage, shall not sail or apply unto any other ports or places than those before mentioned herein, unless she shall be necessitated thereto, by extremity of weather, or other unavoidable accident. And that I the said *A. B.* my executors, administrators, or assigns, shall and will well and truly pay, or cause to be paid, unto the said *C. D.* his executors, administrators, or assigns, at, &c. the sum of 560l. of lawful money of *Great Britain*, in respect of the adventure aforesaid, if the said ship shall go only to the island of *Barbadoes*, and from thence return to *London* to finish her said intended voyage; and the sum of 600l. of like money, if

if the ſaid ſhip ſhall go from thence to the iſland of *May*, and ſo return again to the ſaid iſland of *Barbadoes*, and thence to *London* to end her ſaid voyage; and that within one month after the return of the hull or body of the ſaid ſhip unto the river *Thames*, from her ſaid voyage. Provided always, and it is nevertherleſs the true intent and meaning of theſe preſents, That if the ſaid ſhip, in her intended voyage, ſhall happen to be loſt, miſcarry, or be taken by men of war, or pirates, that then this preſent writing or deed, and every covenant, payment, matter, and thing therein contained, on the part and behalf of me the ſaid *A. B.* to be done, paid, and performed, ſhall be void and of none effect: And that then I the ſaid *A. B.* my executors or adminiſtrators, ſhall not be anywiſe chargeable or liable to pay the ſaid ſeveral ſums before mentioned, or either of them, or any part thereof, to the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, but that he and they are to loſe the ſame, and every part thereof; any thing herein-before contained to the contrary thereof, in anywiſe notwithſtanding. And it is agreed, by and between the ſaid parties to theſe preſents, that in caſe the ſaid ſhip ſhall not be returned unto the river *Thames*, from the ſaid intended voyage, at the end of fourteen months, to be accounted from the date of theſe preſents; and that, at the expiration of the ſaid fourteen months, there ſhall not be juſt proof made of the loſs happening within the time aforeſaid; that then, I the ſaid *A. B.* my executors, adminiſtrators, or aſſigns, ſhall and will, within twenty days next after the end and expiration of the ſaid fourteen months, well and truly pay, or cauſe to be paid, unto the ſaid *C. D.* his executors, adminiſtrators, or aſſigns, at the place of payment aforeſaid, the ſaid ſum of 560 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *Barbadoes* as aforeſaid, and the ſaid ſum of 600 *l.* in caſe the ſaid ſhip ſhall go unto the ſaid iſland of *May* as aforeſaid; and that the ſaid *C. D.* ſhall not run the hazard and adventure of the ſaid ſum by him adventured as aforeſaid, upon the body of the ſaid ſhip, any longer than fourteen months, to be reckoned and accounted as aforeſaid. In witneſs, &c.

No. V.

Form of a Refpondentia Bond, upon an Eaft India *Voyage.*

KNOW ALL MEN by thefe prefents, that I, *A. B.* of in the county of , mariner, am held and firmly bound to *C. D.* of, *&c.* in the fum or penalty of 1,000 *l.* of lawful money of *Great Britain*, to be paid to the faid *C. D.* or to his certain attorney, executors, adminiftrators, or affigns, to which payment, well and truly to be made, I the faid *A. B.* do bind myfelf, my heirs, executors, and adminiftrators firmly, by thefe prefents, fealed with my feal, DATED this 23d day of *January*, in the forty-fecond year of the reign of our Sovereign Lord *George* the third, by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, and in the year of our Lord 1802.

WHEREAS the above-named *C. D.* on the day of the date above written, advanced and lent unto the faid *A. B.* the fum of 500 *l.* upon the goods, merchandize, and effects laden and to be laden on board the good fhip or veffel called *The Saint George*, now riding at anchor in the river *Thames* outward bound, and whereof one *E. F.* is commander Now THE CONDITION of this obligation is fuch, that if the faid fhip or veffel do and fhall, with all convenient fpeed, proceed and fail from and out of the faid river *Thames*, on a voyage to any port or place, ports or places, in the *Eaft Indies*, *China*, *Perfia*, or elfewhere beyond the *Cape of Good Hope*; and from thence do and fhall fail, return, and come back into the faid river *Thames*, at or before the end and expiration of 36 calendar months, to be accounted from the day of the date above written, and there to end her faid intended voyage, (the dangers and cafualties of the feas excepted); AND if the faid *A. B.* his heirs, executors, or adminiftrators, do and fhall within thirty days next after the faid fhip or veffel fhall be returned to the faid port of *London*, from her faid intended voyage, or at and upon the end and expiration of the faid thirty fix calendar months, to be accounted as aforefaid, (which of the faid times fhall firft and next happen), well and truly pay, or caufe to be paid, unto the faid *C. D.* his executors,

administrators, or assigns, the full sum of 500*l.* of lawful money of *Great Britain*, together with the sum of 12 *l.* of like lawful money *per* kalendar month, for each and every kalendar month; and so proportionably for a greater or less time than a kalendar month for all such time, and so many kalendar months as shall be elapsed and run out of the said thirty-six kalendar months, over and above twenty kalendar months, to be accounted from the day of the date above written; Or if, in the said voyage, and within the said thirty-six kalendar months to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties, shall unavoidably happen, and the said *A. B.* his heirs, executors, or administrators, do and shall, within six kalendar months next after such loss, well and truly account for (upon oath if required), and pay unto the said *C. D.* his executors, administrators, or assigns, a just and proportionable average on all the goods and effects of the said *A. B.* carried from *England* on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said *A. B.* shall acquire during the said voyage, for or by reason of such goods, merchandizes, and effects, and which shall not be unavoidably lost; then the above written obligation to be void and of none effect, else to stand in full force and virtue.

A. B. (L. S.)

Sealed and delivered,
(being first duly stamped)
In the presence of

No. VI.

Form of a Policy of Insurance upon a Life, for the Life of the insured, by the Society for equitable Assurances upon Lives.

This present instrument or policy of insurance, witnesseth, that whereas *A. B.* of in the county of hath entered into and become a member of the society for Equitable Assurances on lives and survivorships, according to a certain deed of settlement bearing date the seventh day of *September*, which was in the year of our Lord one thousand seven hundred and sixty-two, and inrolled in his majesty's court of *King's Bench* at *Westminster*; and whereas the said society, relying upon the truth of a certain declaration, dated this day of made and signed by the said *A. B.* touching the age, state of health, and other circumstances attending the said *A. B.* have assured to the said *A. B.* the sum of pounds, to be paid to his executors, administrators, or assigns, after the decease of the said *A. B.* whensoever the same shall happen; provided the said assured does not exceed the age of years on this day of has had the small-pox, and is not afflicted with any disorder which tends to the shortening of life, (as in the said declaration more fully is set forth), at and under the annual sum or premium of

And whereas the said assured hath executed the covenants usually entered into by members of the said society, and hath paid such premium for one whole year, commencing from the date of these presents: Now we, whose names are hereunto subscribed, and seals affixed, being two of the trustees of the said society, do, for ourselves, and our assigns, trustees of the said society, covenant, promise, and agree, to and with the said assured, and the executors, administrators, and assigns of the said assured, that if the said assured, or the assigns of the said assured, shall yearly and every year, during the term of this assurance, continue to pay to the trustees of the said society,

ſociety, or to any two or more of them, the annual ſum or premium aforeſaid, on or before the day of in every year; and ſhall obſerve, perform, fulfil, and keep all and ſingular the covenants, articles, clauſes, proviſos, conditions, and agreements, which on the part and behalf of the ſaid aſſured, are and ought to be obſerved, performed, fulfilled, and kept, according to the true intent and meaning of the ſaid deed of ſettlement: We, or our aſſigns, truſtees of the ſaid ſociety for the time being, will or ſhall, within ſix kalendar months, after ſatisfactory proof ſhall have been made of the death of the ſaid aſſured, well and truly pay, or cauſe to be paid, out of the ſtock or fund of the ſaid ſociety, unto the executors, adminiſtrators, or aſſigns, of the ſaid aſſured, the full ſum ſo hereby aſſured: Provided always, and it is hereby declared to be the true intent and meaning of this policy of aſſurance, and the ſame is accepted by the ſaid aſſured upon theſe expreſs conditions, that in caſe the ſaid aſſured ſhall die upon the ſeas, or ſhall go beyond the limits of *Europe*, unleſs licenſe be obtained from the court of directors, or ſhall die by his own hands, or by the hands of juſtice; or if the age of the ſaid aſſured does exceed years; or if the ſaid aſſured be now afflicted with any diſorder which tends to the ſhortening of life; or if the above-mentioned declaration contains any untrue averment, this policy ſhall be void.

In witneſs, &c.

No. VII.

No. VII.

Form of a Policy of Insurance against Fire.

By the Corporation of the *Royal Exchange* Assurance of Houses and Goods from Fire.

THIS present instrument or policy of assurance witnesseth, that whereas *A. B.* hath agreed to pay into the treasury of the corporation of the *Royal Exchange, London,* for the assurance of from loss or damage by fire. *Now know all men by these presents,* That the capital stock, estate, and securities of the said corporation shall be subject and liable to pay, make good, and satisfy unto the said assured, his heirs, executors, or administrators, any loss or damage which shall or may happen by fire to the said goods aforesaid, (except such goods as hemp, flax, tallow, pitch, tar, turpentine, glass, china, and earthen wares, writings, books of accounts, notes, bills, bonds, tallies, ready money, jewels, plate, pictures, gun-powder, hay, straw, and corn unthreshed), within the space of twelve calendar months from the day of the date of this instrument or policy of assurance, not exceeding the sum of and shall so continue, remain, and be subject and liable, as aforesaid, from year to year, to be computed from the day of in every year, for so long time as the said assured shall well and truly pay, or cause to be paid, the sum of into the treasury of the said corporation, on or before the day of which shall be in each succeeding year, and the said corporation shall agree thereto by accepting and receiving the same; which said loss or damage shall be paid in money immediately after the same shall be settled and adjusted; or otherwise, if the said loss or damage shall not be adjusted, settled, and paid within sixty days after notice thereof shall be given to the said corporation, by the said assured, that then the said corporation, their officers, workmen, or assigns, shall, at the charge of the said corporation, at the end and expiration of the said sixty days, provide and supply the said assured with the like quantity of goods of the same sort and kind, and of equal value and goodness with those burnt or damnified

damnified by fire. *Provided always nevertheless*, and it is hereby declared to be the true intent and meaning of this deed or policy, that the ſaid ſtock, eſtate, and ſecurities of the ſaid corporation ſhall not be ſubject or liable to pay or make good to the aſſured any loſs or damage by fire which ſhall happen by any invaſion, foreign enemy, or any military or uſurped power whatſoever. *Provided alſo*, that this deed or policy ſhall not take place or be binding to the ſaid corporation, until the premium for one year is paid, or in caſe the ſaid aſſured ſhall have already made, or ſhall hereafter make any other aſſurance upon the goods aforeſaid, unleſs the ſame ſhall be allowed of and ſpecified upon the back of this policy: Or if the ſaid *A. B.* at the time when any ſuch fire ſhall happen, ſhall be in the poſſeſſion of, or let to any perſon who ſhall uſe or exerciſe therein the trade of a ſugar-baker, apothecary, chemiſt, colour man, diſtiller, bread or biſcuit baker, ſhip or tallow chandler, ſtable keeper, innholder, or maltſter, or ſhall be made uſe of for the ſtowing or keeping of hemp, flax, tallow, pitch, tar, or turpentine; but that in all or any of the ſaid caſes theſe preſents, and every clauſe, article, and thing, herein contained, ſhall ceaſe, determine, and be utterly void and of none effect, or otherwiſe ſhall remain in full force and virtue. In witneſs whereof, the ſaid corporation have cauſed their common ſeal to be hereunto affixed, the day of in the year of the reign of our Sovereign Lord by the grace of God, of the united kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith, *&c.* and in the year of our Lord one thouſand eight hundred

N. B. This policy to be of no force if aſſigned, unleſs ſuch aſſignment be allowed by an entry thereof in the books of the company.

No. VIII.

Cases reported too late to be inserted in their proper Places.

Visger v. *Prescott*, 5 *Esp.* Rep. 184.

The insurance of neutral property, provided it contravene no policy of the state, will be good, though the court of Admiralty pronounce that there was good cause for the seizure of it, but order it to be restored.

GOODS, the property of persons at *Legborn*, were insured on board the *Fox*, from *New York* to *Gibraltar*.—In an action to recover for a loss by capture, it appeared that the *Fox* sailed from *New York* on the 1st of *June* 1803 for *Legborn*, with orders for the captain to touch at *Gibraltar* for information on the subject of war between *England* and *France*; and if, on his arrival at that place, such a war existed, and he could not proceed to *Legborn*, he was then to sail to *Genoa*, *Naples*, or *Palermo*; that at the time of the ship's sailing from *New York*, and at the time of the capture, *Legborn* was garrisoned by *French* troops; that on the 12th of *July*, the *Fox* was captured by a *British* ship of war, and carried into *Gibraltar*, where the Vice Admiralty Court, after restoring the *Fox*, and all the cargo, except the goods insured, stated: 'That, as it 'appeared doubtful, under all the circumstances, whether 'the property of the inhabitants of *Legborn* was liable to be 'treated indiscriminately as the property of citizens of the '*French* republic, the judge reserved the final adjudication of 'the goods in question for six months for further information 'respecting such doubts, pronounced for just cause of seizure of 'the ship and goods, directed freight to be paid to the captain, 'and the captor's expences to be charged on the goods so re'served:' That on the 20th of *August*, a commission issued for the unloading and sale of the goods, and on the 14th of *February* 1804, a final decree was made directing the value of the goods to be restored to the owners, subjects of the king of *Etruria*, and pronounced for just cause of seizure.—It was objected that, as it appeared by the provisional and final sentences, that there was a just cause of seizure, this action could not be maintained, for though the underwriters insure against capture generally, yet this cannot extend to captures for just cause by a *British* ship, according to the doctrine laid down in *Kellner* v. *Le Mesurier* (*a*)—But Lord *Ellenborough*, who tried

(*a*) Sup. 675.

the

the cause, said, that when the Vice Admiralty Court pronounced for just cause of seizure, it did not adjudge that the goods insured were condemnable; that this was a capture of neutral property, the insurance of which contravened no policy of the state, which constituted the principal difference between this case, and that which had been cited.

An insurance was made by the captain of a ship in the *African* slave trade, "on his commissions, privileges, &c. as "may be hereafter valued."—It appeared that the insured, besides his wages, was entitled, for his trouble in purchasing slaves on the coast of *Africa*, and disposing of them again in the *West Indies*, to 2*l.* *per cent.* on the gross sales, and 4*l.* for every 110*l.*, after deducting the above 2*l.* *per cent.* and the privileges and commissions of the other officers.—It was objected that the commissions and privileges of the insured, being in the nature of wages, the policy was void, within the authority of the case of *Webster* v. *De Tasset* (*a*)—But the court determined that the rule which prohibited the insurance of the wages of the mariners did not apply to the captain; and therefore that the plaintiff was entitled to recover.

King v. *Glover*, 2 N. R. 206.

The commissions and privileges of the captain of a ship in the *African* slave trade may be insured.

In this case, the only question was, whether rice was *corn*, within the meaning of the usual memorandum.—On the trial, the usage was proved to be against its being so considered.—The court held, that the common sense of the words ought to decide, unless a clear usage to the contrary were shewn; and that here the usage accorded with the plain sense of the words, to shew that rice was not intended to be exempted from partial loss (*b*).

Scott v. *Bourdillon*, 2 N. R. 213.

Rice is not corn within the meaning of the common memorandum.

(*a*) Sup. 90.

(*b*) Vid. *Mason* v. *Skurray*, sup. 226.

Thellufon and others v. *Shedden*, 2 N. R. 228.

In an action for a partial lofs, upon a capture and re-capture, the plaintiff muft produce the proceedings of the Admiralty Court to fhew the amount of the falvage and expences for which the underwriters are liable.

In an action on a policy on goods from *Jamaica* to *London* to recover for a lofs by capture, it appeared that the fhip, on her voyage, was captured, and the next day re-captured and brought back to *Jamaica*, where, no perfon claiming on behalf of the infured, the Admiralty court ordered a fale to pay the falvage and expences.—The proceedings in this court were not proved by the plaintiffs, but credit was given to the underwriters for the fum received out of court by the agent of the infured, and the difference only between that fum and the invoice price of the cargo was claimed.—It was objected that the plaintiffs could not recover for this partial lofs without duly proving the proceedings in the court of Admiralty, by which alone the amount of the partial lofs could be afcertained.—But Sir *James Mansfield*, C. J. who tried the caufe, overruled this objection, and a verdict was found for the plaintiff for the partial lofs. —Upon a motion to fet this verdict afide, and grant a new trial, the court were of opinion that, though a capture fimply proved, be evidence of a total lofs, and the reducing of it to a partial lofs might be faid to come in by way of defence; yet, that, where the plaintiff in the fame breath proves a capture and re-capture, there is an end of the total lofs, and he can only claim as for a partial lofs, in which cafe he could legally make out this claim only by the production of the proceedings of the Admiralty court, which had fixed the amount of the falvage and expences to which the underwriters were liable.

Beckwith v. *Sydebotham*, 1 *Camp*. 116.

A witnefs who has never feen the fhip, may be examined, to fhew that, according to the ftatement of another witnefs, who had examined her, fhe was, or was not, fea-worthy.—A letter from which it might be inferred that a fhip, in a foreign port might

In an action on a policy on a fhip, "at and from *Pictou* in "*Nova Scotia* to *Liverpool*," it appeared that the fhip arrived at *Pictou* on the 10th of *May* 1803, and having failed on the voyage infured on the 2d of *September*, met with ftormy weather, and was obliged to put into *Halifax* on the 9th of *October*, fo difabled as to be unfit to profecute the voyage.—It was objected that the fhip when fhe failed from *Pictou* was not fea-worthy; and, to make this out, a depofition of a man who furveyed her on her arrival at *Halifax*, and who defcribed a great many deficiencies he difcovered in her, was read. It was then propofed to call fome eminent furveyors of fhips, who had never feen the fhip in queftion, to prove that a fhip in the ftate defcribed in the depofition, could not have been fea-worthy on the 2d of *September*.—It was objected, that this would be afking the

the opinion of witneſſes, on an *ex parte* ſtatement, which might be falſe.—But Lord *Ellenborough*, who tried the cauſe, over-ruled the objection, upon the ground that the jury might be aſſiſted in matters of ſkill and ſcience by the opinion of perſons particularly converſant with the ſubject.—Another ground of defence was, that before the policy was effected, a letter had been received from the captain of the ſhip, dated at *Pictou* the 14th of *May*, in which he ſtated the damage the ſhip had ſuſtained on the outward voyage, and deſcribing her as being un-ſea-worthy and in need of great repairs, which letter ought to have been communicated to the underwriters, as it would have ſhewn that the ſhip muſt be detained a much longer time than would be neceſſary to take in her cargo; which would have the effect of turning a ſummer riſk into a winter one.—But Lord *Ellenborough* held, that if it were neceſſary to diſcloſe this letter, as indicating the time when the ſhip might ſail, it would in all caſes be neceſſary to inform the underwriters where any repairs are wanting; that if they wiſhed for information on this ſubject, they might have aſked for it; and if they would only inſure a voyage during a particular ſeaſon, they ought to require a warranty that the ſhip ſhould ſail by a certain day; and therefore that the communication of the letter was as little neceſſary to ſhew the probable ſtay of the ſhip at *Pictou*, as to ſhew whether ſhe was ſea-worthy at the commencement of the voyage.

be detained by the want of repairs, need not be communicated to the underwriters.

In an action on a policy on the ſhip *Ganges* and her ſtores, to and from the Southern Whale fiſhery, with liberty to ſeek, join, and exchange convoys, it appeared that the ſhip ſailed from the *Downs* under convoy of the *Fury* ſloop of war, on the 12th of *December* 1805 for *Portſmouth*, and in her paſſage was captured.—The defence was, that a letter from the captain, dated the 5th of *December*, ſtating that he was to ſail under convoy of the *Fury*, and received on the 6th, had not been communicated to the underwriters before effecting the policy, which was not till the 12th or 13th of *January*, the broker merely ſaying, that the ſhip had ſailed about three weeks.—To this two anſwers were given; 1ſt, that the defendant on the 12th of *March* 1806, after reading this letter, together with ſeveral others from the captain, while a priſoner in *France*, giving a full account of all the circumſtances of the caſe, had adjuſted the policy as for a total loſs, which it was contended was concluſive; and 2dly, that the letter itſelf was not material.—Lord *Ellenborough*,

Herbert v. *Champion*, 1 *Campb.* 134

An adjuſtment ſigned even upon a full diſcloſure of all facts, is not concluſive.

who tried the cause, said,—" There are two questions here to be considered; as to the conclusiveness of the adjustment, and as to the materiality of the letter. The cases are clearly distinguishable, where, upon a dispute, the money is paid, and where there is only a *promise* to pay. If the money be actually paid, it cannot be recovered back, without proof of fraud; but a promise to pay will not, in general, be binding, unless founded on a previous liability (*a*). An adjustment is an admission, on the supposition of the truth of certain facts stated, that the insured is entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there is no consideration for the promise it is supposed to prove. An underwriter must make a strong case, after admitting his liability; but, until he has paid the money, he is at liberty to avail himself of any defence which the facts or the law of the case will furnish." 2dly, Respecing the letter, his lordship directed the jury to consider whether it would have had the effect of inducing the underwriters to regard the *Ganges* as a missing ship, and require an increased premium; or, whether it might not have excited their curiosity, or led them to some useful information.—The jury found a verdict for the plaintiff.

Raine v. *Bell*, 9 *East* 195.

A ship may trade, where she has liberty to *touch*, without express permission, provided this occasion no delay, deviation, or additional risk.

The ship *Rio Nova* and freight were insured " From her " loading port or ports on the coast of *Spain* to *London*, with " liberty to *touch and stay* at any port or place whatsoever, " without being deemed a deviation."—It appeared that by the long continuance of the voyage from port to port in *Spain*, and the difficulty of obtaining provisions on the coast at that time, the ship's provisions ran very short, which obliged her to put into *Gibraltar* for a supply; that while the ship lay there for that purpose the captain received on board some chests of dollars on freight, but that this occasioned no delay beyond that which

(*a*) The adjustment has been holden to amount to *primâ facie* evidence of all the facts which constitute a previous liability, subject to be impeached by fraud, or misconception of the law or fact. Vid. sup. b. 1. c. 14. § 3. where the effect of an adjustment is discussed at large.

was justified by the necessity.—In an action to recover for a loss by the perils of the sea off the coast of *Cornwall*, in the home-ward voyage, it was objected on the part of the underwriters on the authority of *Stitt* v. *Wardell*, and *Sheriff* v. *Potts*, that the taking in of the additional cargo of dollars at *Gibraltar*, where there was no liberty to *trade*, avoided the policy.—But the court determined that as this occasioned no delay, nor any increase or alteration of the risk, the plaintiff was entitled to recover.—Mr. Justice *Lawrence*, in delivering his opinion, seemed to question the authority of *Stitt* v. *Wardell*.—Mr. Justice *Le Blanc* said, "That the reason why a liberty is sometimes expressly reserved for a ship to touch, stay, and trade, in the course of the voyage, is not because this is impliedly excluded in every policy in which no such liberty is reserved, but to justify the *delay* in trading there; and that, where no delay is occasioned by the trading, he could see no reason why the court should imply a condition which the parties had not made."

A liberty to trade is given only to justify the *delay*, not to authorize the *trade*.

A policy, dated the 4th of *August* 1803, was effected on a quantity of oil, the property of the plaintiff, an *American* citizen, resident there, "At and from *New York* to *Havre de Grace*," on board the *Hannah*, an *American* ship, duly documented. The ship sailed on the 4th of *July* 1803, and in the course of her voyage was arrested on the 17th and sent into *Bristol*, where she arrived on the 30th. The Court of Admiralty, on the 8th of *October*, ordered the ship and cargo to be restored, subject to freight and expences, but without costs or damages; except a box of books, some bark, and some whalebone, which were condemned as *French* property. The agents of the insured abandoned the oil in question on the 14th of *October*. They were apprized of the detention of the vessel and the suit in the Admiralty soon after they respectively took place; but were not parties to the suit, nor did they know of the restoration of the ship and cargo till the 17th of *October*, three days after the abandonment. On the 6th of *September*, the *British* Government declared *Havre de Grace* to be in a state of blockade. The captain of the *Hannah* refused to proceed to *Havre*, and returned to *New York*, leaving the oil at *Bristol*, where it was sold by agreement without prejudice to the question; and the loss amounted to 45*l.* 2*s.* 8*d.* *per cent.* of which the freight and expences of restoration amounted to 20*l* 19*s.* *per cent.*—Upon this

Barker v. *Blakes*, 9 *East* 283.

A quantity of oil, the property of a neutral on board a neutral ship, is insured from a neutral to an enemy's port. The ship is arrested and brought to *England*, having enemy's goods on board. The ship and cargo are restored, except the enemy's goods, which are condemned.—The port to which the oil was destined is afterwards put under blockade, so that the ship cannot proceed thither:—The insurance was legal; the seizure and detention amounted to a loss of the voy-

age,' and would entitle the insured to a total loss:—But an abandonment, five weeks after the blockade had rendered the further prosecution of the voyage impracticable, was out of time, and the insured, therefore, entitled to a partial loss only.

this case it was objected on the part of the underwriters, 1st, That the loss did not arise from any risk within the policy; for, as some of the goods were enemies' property, *the detention was lawful*; and that the policy did not protect the insured against the effects of a lawful *British* capture or detention. 2dly, That, supposing the plaintiff entitled to recover any thing, it could only be a partial loss, the abandonment being out of time.—The Court determined, 1st, That the mere act of carrying enemies' goods on board was no breach of neutrality; that the *American* was at liberty to pursue his commerce with *France*, and to be the carrier of goods for *French* subjects, at the risk, indeed, of having his voyage interrupted by the goods being seized, or the vessel itself detained; that the indemnity sought was not secured by the policy to an enemy, or to a neutral forfeiting his neutrality; but to a neutral, as such, against the consequences of an act justifiably done in the exercise of his neutral rights, and as justifiably controlled on our part, in the exercise of our belligerent rights against enemies' property found on board; and that the voyage and the commerce in which the vessel was engaged not being of an hostile description, nor in any manner forbidden by the law or policy of this country, there was no ground for the first objection. 2dly, That the *loss of the voyage*, (the only description of loss that could be contended for in this case) was occasioned by the detention in question, which contin ed till after the blockade, which rendered the further prosecution of the voyage impracticable, took place, would have entitled the insured to recover as for a total loss, if he had abandoned in due time: but that the abandonment on the 16th of *October*, above five weeks after the blockade of *Havre* (the latest event to which the loss of the voyage could be referred) had been publicly notified, was not in due time; and that, therefore, the amount of the loss must be restricted to 20*l.* 19*s.* *per cent.* the amount of the freight and expences, to which the insured was subjected by the sentence of the Court of Admiralty.

Norvill v. *St. Barbe*, 2 N. R. 34.

A ship is licensed by the *India Company* for three

The ship *Venus* was insured " At and from the *Cape of* " *Good Hope* to *Botany Bay*, *Port Jackson*, and all other ports " and places in *New South Wales*, &c. and all places beyond " *Cape Horn*, the *East Indies*, *Persia*, *China*, the north-west " coast of *America*, and to all places whatsoever after her de- " parture

" parture from the *Cape of Good Hope*, and at all times, until " her safe arrival and *final discharge* at *Canton*; with leave to " sell, resell, &c. and to load, unload, &c. at any port or " place, without inquiring into the regularity of her proceed- " ings, and to continue until her arrival as above; with leave to " touch and trade at all ports and places in the *East Indies*, " *Persia*, and *China*, in whatever latitude or longitude, particu- " larly between *Cape Horn* and *Kamskatka*, and all islands, after " her departure from *Botany Bay*; and, after her final discharge, " on her homeward voyage to *England*." (*a*)—A licence was obtained from the *East India* Company, dated the 29th of *October* 1800, for the said ship, for a voyage into the *Pacific Ocean*, to sell her cargo on the north-west coast of *America*, and from thence to *Japan*, *Koma*, and *Canton*, and there dispose of her cargo, obtained on the north-west coast of *America*, and remit the proceeds through the *Company*'s treasury to *London*, and then return to *England*; but not to touch at any place in *China* but *Canton*, with a proviso that it should not authorize the *Venus* to continue within the Company's limits for more than *three years*. The *Venus* arrived at *Botany Bay* in *October* 1801, from whence she failed to *Otaheite* for a cargo of pork, with which she returned to *Botany Bay*, and again failed from thence in *February* 1803, but was never heard of more.—Upon the trial it was objected on the part of the defendant that it was evident from the date of the ship's leaving *Botany Bay* the second time, that the voyage described in the licence and the policy had been abandoned, and that therefore the underwriters were discharged—Sir *James Mansfield*, C. J., who tried the cause, left it to the jury to consider whether it was possible for the ship, after leaving *Botany Bay* the second time, to go to the north-west coast of *America*, from thence to *Canton*, and from thence out of the Company's limits, on her return to *England*, within the three years limited by the licence.—The jury found a verdict for the plaintiff.—Upon a motion for a new trial, it was contended, on the part of the defendant, that, in the case of a deviation, the *terminus ad quem* remains, but the course thither is changed; but that, where the *terminus ad quem* is changed, it is not a deviation, but an abandonment of

years to take a cargo to the *Pacific Ocean*, and the north west coast of *America*, there to trade and purchase a new cargo, to sail therewith to *Canton*, and there dispose thereof, and remit the proceeds to *England* through the *Company*'s treasury. The ship sails to *Botany Bay*, from thence to *Otaheite* returns to *Botany Bay*, and sails again from thence, but is never heard of after.—Though she was considered as having abandoned all intention of proceeding to *Canton*, this was not an abandonment of the voyage, which still continued legal, though the whole voyage described in the licence, became impracticable, and the underwriters were held liable.

(*a*) This is a short abstract of the farago of words in which the voyage in this most singular policy was described.

the voyage; and that ſuch an abandonment, at whatever time it takes place, whether before or after the arrival of the ſhip at the dividing point, diſcharges the underwriters. That in this caſe, the *terminus ad quem* was *Canton*, and this being abandoned, the terms of the licence were violated. But the court determined that the verdict ſhould ſtand. They held, that if it ſhould happen that the ſhip, could not, by the diſpoſal of her cargo, raiſe funds to purchaſe furs or other goods on the north-weſt coaſt of *America*, or in the *Pacific Ocean*, to make it worth while to go to *Canton*, there was nothing in the licence from which it muſt of neceſſity be implied that ſhe was to go to *Canton* at all events.

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